
TEXAS REGISTER

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*Devin McQueen
10th Grade*



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

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THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for September 16, 2010

Appointed as Judge of the 219th Judicial District Court, Collin County, effective October 5, 2010, for a term until the next General Election and until his successor shall be duly elected and qualified, Scott J. Becker of McKinney. Mr. Becker is replacing Judge Curt B. Henderson who retired.

Appointed to the Texas Poet Laureate, State Musician and State Artists Committee for a term to expire October 1, 2011, Bill F. Schneider of Austin (replacing Rita E. Baca of El Paso who resigned).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2012, Scott Adams of Fort Davis (replacing Janet Boone of North Zulch whose term expired).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2012, Brian J. Christian of Round Rock (Mr. Christian is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2012, Richard Gerard of Livingston (Mr. Gerard is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2012, Janet D. Meyers of Aubrey (Ms. Meyers is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2012, Ronald J. Suchecki, Jr. of China Spring (Mr. Suchecki is being reappointed).

Rick Perry, Governor

TRD-201005468



THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following:
Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from
the Attorney General's Internet site <http://www.oag.state.tx.us>.

Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: <http://www.oag.state.tx.us/opinopen/opinhome.shtml>.)

Request for Opinion

RQ-0916-GA

Requestor:

The Honorable Lucinda A. Vickers

Atascosa County Attorney

#1 Courthouse Circle Drive, #3-B

Jourdanton, Texas 78026

Re: Whether a county clerk is required to permit a member of the public to copy records with a sheet feed scanner (RQ-0916-GA)

Briefs requested by October 18th, 2010

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201005480

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: September 22, 2010



Opinions

Opinion No. GA-0797

The Honorable Eddie Lucio, Jr.

Chair, Committee on International Relations and Trade

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Calculation of impact fees for a platted subdivision (RQ-0854-GA)

S U M M A R Y

Local Government Code chapter 245 recognizes a developer's vested rights and requires a regulatory agency to consider approval or disapproval of an application for a permit based on regulations and ordinances in effect at the time an original application is filed. A developer has no vested rights in a project under chapter 245 if the project is dormant under section 245.005.

Local Government Code chapter 395 governs the imposition of impact fees by municipalities. Impact fees are, as a general matter, charges on new development to pay for public facilities that become necessary as the result of growth in a particular area. A municipality must refund impact fees as provided in section 395.025. There is, as reflected in the express language of chapter 395 and in prior attorney general opinions, a distinction between the *assessment* of an impact fee and the *collection* of an impact fee. Chapter 395 indicates that the act of adopting an impact fee and the act of assessing an impact fee are distinct activities. However, we cannot say as a matter of law that a single ordinance could not serve as both the means by which a municipality imposes and assesses an impact fee. By its express terms, section 395.017 prohibits the imposition of additional or increased impact fees against a tract after the fees have been assessed unless the number of service units to be developed on the tract increases.

Opinion No. GA-0798

The Honorable Scott Brumley

Potter County Attorney

500 South Fillmore Street, Room 303

Amarillo, Texas 79101

Re: Method by which a hospital district may set an ad valorem tax rate when it has not set a tax rate since 1996 (RQ-0856-GA)

S U M M A R Y

The Tax Code does not provide a special method for a tax rate to be adopted by a hospital district that has not adopted a tax rate or levied a tax since 1996. We cannot predict whether a court would uphold a tax rate adopted without following the rollback procedures mandated by chapter 26 of the Tax Code.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201005479

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: September 22, 2010



PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. “(No change)” indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 17. BIRTHING CENTER SERVICES

1 TAC §354.1261, §354.1262

The Texas Health and Human Services Commission (HHSC) proposes new §354.1261, concerning Benefits and Limitations, and new §354.1262, concerning Conditions for Participation.

Background and Justification

The proposed new rules are the result of the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111-148, Title II, Subtitle D, Section 2301, which added freestanding birthing center services to section 1905(a) of the Social Security Act and requires states to make payments directly to freestanding birth centers.

On September 1, 2009, the previous rules relating to birthing center services were repealed as a result of direction from the Centers for Medicare and Medicaid Services (CMS) to discontinue Medicaid payments directly to birthing centers for services provided by the facility.

The proposed rules and the related reimbursement rule at 1 TAC §355.8181, Birthing Center Reimbursement, will bring HHSC into compliance with the Affordable Care Act by identifying birthing centers as eligible Medicaid providers and providing for direct payments to birthing centers.

Section-by-Section Summary

§354.1261. Benefits and Limitations.

Proposed new §354.1261(a) describes birthing center services as those determined to be reasonable and necessary for the care of the mother and live newborn; requires the attending physician or certified nurse-midwife (CNM) to be licensed; describes reimbursable services as those provided by the birthing center during the labor, delivery, and post-partum periods; and specifies that covered services begin when the mother is in active labor and admitted to the center and end within 24 hours after the birth of the child.

Proposed new §354.1261(b) indicates that services provided by the physician or CNM are not considered birthing center services.

Proposed new §354.1261(c) specifies that services provided by a licensed midwife and any associated birthing center services are not reimbursable.

§354.1262. Conditions for Participation.

Proposed new §354.1262 describes the participation conditions for birthing centers. Birthing centers must comply with applicable federal, state, and local laws and regulations; be licensed by the appropriate state licensing authority to provide a level of services commensurate with the professional skills of a physician or CNM acting as a birth attendant; meet standards established by the appropriate licensing authority; be enrolled in Texas Medicaid; sign a written provider agreement; submit copies of all documents required for licensure by the appropriate state licensing authority; notify HHSC or its designee within two weeks of any change in licensure status or information required for licensure; and bill for services in the manner and format prescribed.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for HHSC, has determined that during the first five-year period the proposed new rules are in effect, there will be no fiscal impact to state government. The proposed rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Birthing centers will be able to enroll as Medicaid providers and receive direct Medicaid payments for birthing center services. Effective September 1, 2009, the date that the previous rules were repealed, CNMs and physicians began receiving a higher payment for certain services provided in birthing centers in order to compensate the birthing center for use of the facility. When direct payments are reinstated to birthing centers, the higher rates that are paid to CNMs and physicians for services provided in a birthing center will be reduced. Therefore, the reinstatement of payments to birthing centers will be offset by the reduction in rates to CNMs and physicians.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the new requirements, as they will not be required to alter their business practices as a result of the rules.

There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed new rules are in effect, the expected public benefit of the addition of these rules is that HHSC will be in compliance with the PPACA. In addition, birthing centers will be able to enroll in Medicaid, thereby expanding access to low-cost birthing services.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Tania Colon, Policy Analyst for Acute Care Policy Development, Medicaid and CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, MC-H310, Austin, Texas 78708-5200; by fax to (512) 491-1953; or by e-mail to tania.colon@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for November 2, 2010 from 1:00 p.m. to 2:00 p.m. (central time) in the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

Statutory Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed new rules affect the Texas Government Code, Chapter 531, and Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§354.1261. Benefits and Limitations.

(a) Subject to the specifications, conditions, limitations, and requirements established by the Health and Human Services Commission (HHSC) or its designee, birthing center services are those center services determined by the attending physician (MD or DO) or certified nurse-midwife (CNM) to be reasonable and necessary for the care of the mother and live newborn child following the mother's normal, uncomplicated pregnancy. The attending physician or CNM must be licensed at the time and place the services are provided. Reimbursable services are limited to services provided by the birthing center during the labor, delivery, and postpartum periods. Unless otherwise specified

by HHSC or its designee, covered services begin when the mother is in active labor and is admitted to the birthing center, and end within 24 hours after the birth of the child.

(b) Services provided by a physician or CNM are not considered to be birthing center services.

(c) Services provided by a licensed midwife and any associated birthing center services are not covered or reimbursable by the Texas Medical Assistance Program.

§354.1262. Conditions for Participation.

Subject to the specifications, conditions, limitations, and requirements established by the Health and Human Services Commission (HHSC) or its designee, a birthing center must:

(1) comply with all applicable federal, state, and local laws and regulations;

(2) be licensed by the appropriate state licensing authority to provide a level of services commensurate with the professional skills of a physician (MD or DO) or certified nurse-midwife (CNM) who acts as the birth attendant;

(3) meet and continue to meet the standards for birthing centers established by the appropriate state licensing authority;

(4) be enrolled and approved for participation in the Texas Medical Assistance Program;

(5) sign a written provider agreement with HHSC or its designee. By signing the agreement, the birthing center agrees to comply with the terms of the agreement and all requirements of the Texas Medical Assistance Program, including regulations, rules, handbooks, standards, and guidelines published by HHSC or its designee;

(6) submit to HHSC or its designee copies of all documents required for licensure by the appropriate state licensing authority;

(7) notify HHSC or its designee, in writing, within two weeks of any change in its licensure status or information required for licensure; and

(8) bill for services covered under the Texas Medical Assistance Program in the manner and format prescribed by HHSC or its designee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005421

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 424-6900



CHAPTER 355. REIMBURSEMENT RATES SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES 1 TAC §355.306

The Health and Human Services Commission (HHSC) proposes to amend §355.306, concerning Cost Finding Methodology.

Background and Justification

Section 355.306 establishes some of the requirements for completing the HHSC cost report for nursing facilities. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to replace an outdated reference.

Section-by-Section Summary

The proposed amendment to subsection (e) replaces an outdated reference to 1 TAC §19.2308(2) (Change of Ownership) with 1 TAC §19.2308(c)(1)(A) (relating to Change of Ownership).

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The proposed amendment will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the amended section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of this proposed amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each year of the first five years the amendment is in effect, the expected public benefit is that the rules will contain correct references to information regarding nursing facility change of ownership, thus allowing the public to access accurate information.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Cilla Hammer in the HHSC Rate Analysis Department by telephone at (512) 491-1371. Written comments on the proposal may be submitted to Cilla Hammer by facsimile at (512) 491-

1983, by e-mail to cilla.hammer@hhsc.state.tx.us or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resource Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment affects the Human Resources Code Chapter 32, and the Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.306. *Cost Finding Methodology.*

(a) Providers excused from completing a cost report. Providers are excused from completing a cost report if:

(1) the cost report would represent costs accrued during a time period immediately preceding a period of decertification, if the decertification period was greater than either 30 calendar days or one entire calendar month.

(2) the cost report would be a final cost report (due to a change of ownership or if the facility no longer contracts to serve Medicaid clients) and one of the following applies:

(A) the final cost-reporting period would end after more than 30 calendar days, or more than one entire calendar month before the end of the facility's cost report fiscal year, during the reporting period in question; or

(B) the Texas Health and Human Services Commission (HHSC), or its designee, has excused the provider from submitting a final cost report because:

(i) the report would be due before the appropriate cost report form was finalized, which would result in the final cost report being completed on an inappropriate cost report form; or

(ii) the facility was controlled by at least two different owners during a single calendar year and each owner would otherwise have submitted a cost report with an ending date that fell within that calendar year.

(3) the cost-reporting period would be less than or equal to 30 calendar days or one entire calendar month.

(b) Exclusion of and adjustments to certain reported expenses. Providers are responsible for eliminating unallowable expenses from the cost report. HHSC reserves the right to exclude any unallowable costs from the cost report and to exclude entire cost reports from the reimbursement determination database if there is reason to doubt the accuracy or allowability of a significant part of the information reported.

(1) Cost reports included in the database used for reimbursement determination.

(A) Individual cost reports will not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(B) In the event that all cost reports submitted for a specific facility are disqualified through the application of subparagraph

(A)(i) and/or (ii) of this paragraph, the facility will not be represented in the reimbursement database for the cost report year in question.

(2) Adjustments and exclusions of cost report data include, but are not necessarily limited to:

(A) Fixed capital asset costs.

(i) HHSC staff determine fixed capital asset costs as detailed in this section.

(ii) Fixed capital asset costs are reimbursed in the form of a use fee calculated as described in §355.307 of this title (relating to Reimbursement Setting Methodology). The following fixed capital charges are excluded from the reimbursement base:

(I) building and building equipment depreciation and lease expense;

(II) mortgage interest;

(III) land improvement depreciation; and

(IV) leasehold improvement amortization.

(B) Limits on other facility and administration costs. To ensure that the results of HHSC's cost analyses accurately reflect the costs that an economic and efficient provider must incur, HHSC may place upper limits or caps on expenses for specific line items and categories of line items included in the rate base for the administration and facility cost centers. HHSC sets upper limits at the 90th percentile in the array of all costs per unit of service or total annualized cost, as appropriate for a specific line item or category of line item, as reported by all contracted facilities, unless otherwise specified. The specific line items and categories of line items that are subject to the 90th percentile cap are:

(i) total buildings and equipment rental or lease expense;

(ii) total other rental or lease expense for transportation, departmental, and other equipment;

(iii) building depreciation;

(iv) building equipment depreciation;

(v) departmental equipment depreciation;

(vi) leasehold improvement amortization;

(vii) other amortization;

(viii) total interest expense;

(ix) total insurance for buildings and equipment;

(x) facility administrator salary, wages, and/or benefits with the cap based on an array of nonrelated-party administrator salaries, wages, and/or benefits;

(xi) assistant administrator salary, wages, and/or benefits with the cap based on an array of nonrelated-party assistant administrator salaries, wages, and/or benefits;

(xii) facility owner, partner, or stockholder salaries, wages, and/or benefits (when the owner, partner, or stockholder is not the facility administrator or assistant administrator), with the cap based on an array of nonrelated-party administrator salaries, wages, and/or benefits;

(xiii) other administrative expenses including the cost of professional and facility malpractice insurance, advertising expenses, travel and seminar expenses, association dues, other dues, professional service fees, management consultant fees, interest

expense on working capital, management fees, other fees, and miscellaneous office expenses; and

(xiv) total central office overhead expenses or individual central office line items. Individual line item caps are based on an array of all corresponding line items.

(C) Occupancy adjustments. HHSC adjusts the facility and administration costs of providers with occupancy rates below a target occupancy rate. The target occupancy rate is the lower of:

(i) 85%; or

(ii) the overall average occupancy rate for contracted beds in facilities included in the rate base during the cost reporting periods included in the base.

(D) Cost projections. HHSC projects certain expenses in the reimbursement base to normalize or standardize the reporting period and to account for cost inflation between reporting periods and the period to which the prospective reimbursement applies as specified in §355.108 of this title (relating to Determination of Inflation Indices).

(3) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in paragraph (1)(A)(i) of this subsection.

(c) Reimbursement determinations and allowable costs. Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursement. HHSC excludes from reimbursement determinations any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers.

(d) General information. In addition to the requirements of this section, cost reports will be governed by the information in §355.101 of this title (relating to Introduction), §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures), §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), §355.107 of this title (relating to Notification of Exclusions and Adjustments), §355.108 of this title (relating to Determination of Inflation Indices), §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs), and §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(e) Final cost reports for change of ownership. Except when excused from the requirement to submit a cost report according to subsection (a) of this section, when a facility changes ownership, the prior owner must submit a completed cost report reflecting the facility's activities from the beginning of the prior owner's cost report fiscal year until the ownership-change effective date. The prior owner's vendor payments may be held until HHSC receives an acceptable final cost report according to 40 TAC §19.2308(c)(1)(A) [(2)] (relating to Change of Ownership).

(1) In cases where the prior owner's vendor payment is held, within seven calendar days of receipt by HHSC of an acceptable final cost report, HHSC will forward the final cost report to audit.

(2) In cases where the facility is sold and its prior year's cost report is pending audit completion, the owner's vendor payment

may be held until the audit of the prior year's cost report and the final cost report are complete.

(f) Requirements for cost report completion. A completed nursing facility cost report must:

(1) meet the definition of completed cost report specified in §355.105(b)(4)(A) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~];

(2) have attached the property appraisal used to determine the allowable appraised property value as described in subsection (g) of this section;

(3) not report figures for days of service and number of beds that reflect occupancy of greater than 100%;

(4) have a management contract attached, if applicable; and

(5) have a lease agreement attached, if applicable.

(g) Allowable appraised property values. Allowable appraised property values are determined as follows:

(1) Proprietary facilities. The allowable appraised values of proprietary facilities to be reported on Texas Medicaid cost reports are determined from local property taxing authority appraisals. The year of the property appraisal must be the calendar year within which the provider's cost report fiscal year ends, or the prior calendar year.

(2) Tax exempt facilities. The allowable appraised property values for tax exempt facilities are determined as follows.

(A) Tax exempt facilities provided an appraisal from their local property taxing authority. Tax exempt facilities provided an appraisal from their local property taxing authority must report this appraised value on their Texas Medicaid cost report. The year of the property appraisal must be the calendar year within which the provider's cost report fiscal year ends, or the prior calendar year.

(B) Tax exempt facilities not provided an appraisal from their local property taxing authority. Tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status must provide documentation received from the local taxing authority certifying exemption for the current reporting period and must contract with an independent appraiser to appraise the facility land and improvements. These independent appraisals must meet the following criteria.

(i) The appraisal must value land and improvements using the same basis used by the local taxing authority under Texas laws regarding appraisal methods and procedures.

(ii) The appraisal must be updated every five years with the initial appraisal setting the five-year interval.

(I) Facilities achieving exempt status during their fiscal year ending in calendar year 1997 or a subsequent year must submit an initial appraisal to HHSC's Rate Analysis Department as part of their cost report for the fiscal year during which the exempt status was achieved. This appraisal must be reflective of the facility's appraised value during that fiscal year.

(II) If a facility is reappraised due to improvements or reconstruction as defined in clause (iii) of this subparagraph, a new five-year interval will be set.

(iii) Facilities making capital improvements, or requiring reconstruction due to fire, flood, or other natural disaster, when the improvements or reconstruction cost more than \$2,000 per licensed bed, may contract with an independent appraiser to have land and im-

provements reappraised within the cost reporting period in which the improvement(s) is placed into service.

(iv) If for any reason an appraisal becomes available from the local taxing authority for a provider who previously lacked such an appraisal, the provider must report, on the next Texas Medicaid cost report submitted, the local taxing authority's appraised values instead of the independent appraisal values.

(3) Governmental facilities. Governmental facilities are exempt from the requirement to report an appraised property value.

(h) In addition to the requirements of §355.102 and §355.103 of this title [~~(relating to General Principles of Allowable and Unallowable Costs; and Specifications for Allowable and Unallowable Costs)~~], the following apply to costs for the nursing facilities (NF) program.

(1) Medical costs. The costs for medical services and items delineated in 40 TAC §19.2601 (relating to Vendor Payment) are allowable. These costs must also comply with the general definition of allowable costs as stated in §355.102 of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~].

(2) Chaplaincy or pastoral services. Expenses for chaplaincy or pastoral services are allowable costs.

(3) Voucherable costs. Except as detailed in subparagraphs (A) and (B) of this paragraph, any expenses directly reimbursable to the provider through a voucher payment and any expenses in excess of the limit, or ceiling, for a voucher payment system are unallowable costs.

(A) The ventilator dependent supplemental voucher system and the children with tracheostomies supplemental voucher system are not subject to the cost reporting restrictions described in this paragraph.

(B) Select voucher systems, when indicated by department procedures, are not subject to the cost reporting restrictions described in this paragraph. To avoid the possibility of providers being reimbursed through the voucher system and the daily rate for the same expenses, the department may not waive the cost reporting restrictions described in this paragraph unless the following criteria are met:

(i) the voucher system is a temporary system;

(ii) the costs represent ongoing costs; and

(iii) the costs are not represented in the payment rate until after the voucher system has been discontinued.

(4) Preferred items. Costs for preferred items which are billed to the recipient, responsible party, or the recipient's family are not allowable costs.

(5) Preadmission Screening and Annual Resident Review (PASARR) expenses. Any expenses related to the direct delivery of specialized services and treatment required by PASARR for residents are unallowable costs.

(6) Advanced Clinical Practitioner (ACP) or Licensed Professional Counselor (LPC) services. Expenses for services provided by an ACP or LPC are unallowable costs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2010.

TRD-201005346



SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 10. BIRTHING CENTER SERVICES

1 TAC §355.8181

The Texas Health and Human Services Commission (HHSC) proposes new §355.8181, concerning Birthing Center Reimbursement.

Background and Justification

The proposed new rule is a result of the passage of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148, Title II, Subtitle D, Section 2301, which added free-standing birth center services to section 1905(a) of the Social Security Act as a mandatory Medicaid state plan service. The proposed new rule describes the reimbursement methodology for birthing center services, which will allow licensed birthing centers to receive direct Medicaid reimbursement for services provided in the facility.

In conjunction with this proposed rule, HHSC is also proposing program rules for birthing centers at 1 TAC §354.1261, Benefits and Limitations for Birthing Center Services, and 1 TAC §354.1262, Conditions for Participation for Birthing Center Services. These changes will bring HHSC into compliance with federal law by making birthing centers a payable Medicaid provider.

Section-by-Section Summary

Proposed new subsection (a) states that payment for covered birthing center services is limited to the lesser of the provider's customary charge or the maximum allowable fee listed on a fee schedule established by HHSC.

Proposed new subsection (b) outlines billing requirements for birthing center services. Birthing centers will receive separate Medicaid reimbursement and may not bill for services provided in the birthing center by another provider type without prior approval from HHSC.

Proposed new subsection (c) references rules at §355.8085, which describes reimbursement for physician services, and §355.8161, which describes reimbursement for certified nurse midwife services.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed new rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Birthing centers will be able to enroll as Medicaid providers and receive direct Medicaid payments for birthing center services. Effective September 1, 2009, the date that the previous rule was repealed, CNMs and physicians began receiving a higher payment for certain services provided in birthing centers in order to

compensate the birthing center for use of the facility. When direct payments are reinstated to birthing centers, the higher rates that are currently paid to CNMs and physicians for services provided in a birthing center will be reduced. Therefore, the reinstatement of payments to birthing centers will be offset by the reduction in rates to CNMs and physicians.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro businesses that are Medicaid providers. Providers will not be required to alter their business practices as a result of the rule. There are no significant other costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit by the adoption of this rule. This proposal allows birthing centers to bill for Medicaid services provided in their centers in compliance with federal law.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Megan Blood, Rate Analyst, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax to (512) 491-1998; or by e-mail to megan.blood@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed new rule affects Texas Human Resources Code Chapter 32, and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8181. Birthing Center Reimbursement.

(a) Subject to the specifications, conditions, limitations, and requirements established by the Health and Human Services Commission (HHSC), payment for covered birthing center services provided by a participating birthing center is limited to the lesser of the provider's customary charge or the maximum allowable fee listed on a fee schedule established by HHSC.

(b) The birthing center must bill for the covered services that it provides. The attending physician or certified nurse midwife (CNM) will be reimbursed separately. Unless approved by HHSC, the birthing center may not bill for services provided by another type of provider. The birthing center must be enrolled and approved for participation in the Medicaid program at the time the services are provided.

(c) Reimbursement for services provided by a physician is described in §355.8085 of this subchapter (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners). Reimbursement for services provided by a CNM is described in §355.8161 of this subchapter (relating to Reimbursement Methodology).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005422

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 424-6900



CHAPTER 356. MEDICAID AND CHIP ELECTRONIC HEALTH INFORMATION SUBCHAPTER A. MEDICAID ELECTRONIC HEALTH RECORD

1 TAC §356.101

The Texas Health and Human Services Commission (HHSC) proposes to add new Chapter 356, Medicaid and Chip Electronic Health Information; Subchapter A, Medicaid Electronic Health Record; §356.101, Data for the Medicaid Eligibility and Health Information System. New §356.101 relates to electronic health information and data for the Medicaid Eligibility and Health Information System (MEHIS).

Background and Justification

The new rule implements the MEHIS, a statewide system that replaces the current paper Medicaid identification form with a permanent plastic card, automates Medicaid eligibility verification, provides an electronic health record (EHR) for all Medicaid clients, offers electronic prescribing functionality, and establishes a foundation for future health information exchange for improved efficiency, continuity of care, and health outcomes. Information accessed through the EHR will include eligibility information, prescription drug history, claims and encounter data, immunization data, and other appropriate information.

Implementation of the MEHIS complies with the requirements of House Bill 1218, 81st Legislature, Regular Session, 2009, which

directs HHSC to adopt rules specifying the information required to be included in the EHR. The MEHIS will maintain the confidentiality of patient health records in compliance with all applicable state and federal laws.

Section-by-Section Summary

Proposed new subsection (a) describes the purpose of MEHIS.

Proposed new subsection (b) lists the key data elements that will be included in the Medicaid EHR as they become available.

Proposed new subsection (c) indicates that confidentiality is maintained in compliance with state and federal law.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed new rule is in effect, there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro businesses to comply with the proposed new rule, as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the section is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit of enforcing the proposed new rule will be a more durable Medicaid identification card, automated Medicaid eligibility verification, and improved access to health information.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Adelina Guerra, Business Analyst, P.O. Box 85200, H-390, Austin, Texas 78708; by fax to (512) 491-1957; or by e-mail to adelina.guerra@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for November 2, 2010 from 3:00 p.m. to 4:00 p.m. (central time) in the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 (and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas).

The proposed new rule affects Texas Human Resources Code Chapter 32, and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§356.101. Data for the Medicaid Eligibility and Health Information System.

(a) The Medicaid Eligibility and Health Information System (MEHIS) is a statewide system designed to improve the quality, safety, and efficiency of health-care services provided under the Medicaid program. The Texas Health and Human Services Commission (HHSC) will utilize the system to replace the paper Medicaid identification form with a permanent plastic card, automate eligibility verification, provide an electronic health record (EHR) for Medicaid recipients, offer electronic prescribing functionality, and establish a foundation for future health information exchange for improved efficiency, continuity of care, and health outcomes.

(b) The MEHIS EHR includes the following key data elements as they become available electronically to HHSC:

(1) Eligibility data to include the same data found on the former paper Medicaid identification form, which is described by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) 270/271 eligibility transaction;

(2) Claims and encounter data for Medicaid-enrolled clients;

(3) Immunization data;

(4) Prescription drug history;

(5) Texas Health Steps (THSteps) information, including completed, pending, and past due THSteps services;

(6) Laboratory data; and

(7) Other health history information.

(c) The MEHIS maintains the confidentiality of patient health records in compliance with all applicable state and federal laws.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005423

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 424-6900

SUBCHAPTER B. MEDICAID ELECTRONIC HEALTH RECORD INCENTIVE PAYMENT PROGRAM

1 TAC §356.201

The Texas Health and Human Services Commission (HHSC) proposes to add new Chapter 356, Medicaid and CHIP Electronic Health Information (EHI); Subchapter B, Medicaid Electronic Health Record Incentive Payment Program; §356.201, General Provisions. New §356.201 relates to general provisions of the Electronic Health Record (EHR) incentive payment program. Subchapter A is reserved for general provisions relating to the Medicaid Eligibility Health Information Systems.

Background and Justification

Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub.L. 111-5) amends titles XVIII and XIX of the Social Security Act (the Act) by establishing a program to provide incentive payments to eligible professionals (i.e., physicians, dentists, nurse practitioners, certified nurse midwives, and physician assistants in rural health clinics) and eligible hospitals that participate in the Medicaid program to promote the adoption and meaningful use of certified EHR technology. A certified EHR is an electronic record of health-related information on an individual that includes patient demographic and clinical health information, such as medical histories and problem lists, that has the capacity to provide clinical decision support; to support physician order entry; to capture and query information relevant to health care quality; and to exchange electronic health information with, and integrate such information, from other sources. The Centers for Medicare and Medicaid Services (CMS) will provide 100 percent Federal financial participation (FFP) for provider incentive payments to encourage Medicaid health care providers to adopt, implement, and operate certified EHR technology. CMS will also provide a 90 percent FFP match for state expenses for administration of the EHR incentive payment program. Medicaid providers are able to receive incentive payments from January 2011 until 2021.

Section Summary

Proposed new §356.201 establishes the Medicaid EHR Incentive Payment Program in accordance with 42 Code of Federal Regulations Parts 412, 413, 422, and 495. Detailed information on how to qualify for this program and receive EHR incentive payments will be found in the Texas Medicaid Provider Procedures Manual.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact to state government general revenue of \$436,906 for State Fiscal Year (SFY) 2011; \$688,490 for SFY 2012; \$380,940 for SFY 2013; \$386,590 per year for SFY 2014-2015. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Ms. Rymal has also determined that there will not be an effect on small businesses or micro-businesses to comply with the new

requirements, as they will not be required to alter their business practices as a result of the rule.

There are not anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that when the proposed new rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit of enforcing the new rule will be improved quality of health care services.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposed new rule may be submitted to Yvonne Sanchez, Senior Health Policy Analyst, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, MC600, Austin, Texas 78708-5200; by fax to (512) 491-1977; or by e-mail to yvonne.sanchez@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for October 18, 2010 from 11:00 a.m. to 12:00 p.m. (central time) in the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Human Resources Code §32.0312.

The proposed new rule affects the Human Resources Code Chapter 32, and the Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§356.201. General Provisions.

The American Reinvestment and Recovery Act of 2009 (Pub.L. 111-5), Division B, title IV, section 4201, Medicaid Providers Health Information Technology (HIT) Adoption and Operation Payments, authorizes states, at their option, to provide incentive payments to Medicaid providers for the meaningful use of certified electronic health record (EHR) technology. On or after January 1, 2011, the Texas Health and Human Services Commission will implement a Medicaid EHR incentive payment program in accordance with the applicable provisions in 42 Code of Federal Regulations Part 495. The purpose of the incentive program is to promote the adoption and meaningful use of interoperable health information technology and qualified electronic health records. Detailed information on how to qualify for this program and receive EHR incentive payments will be found in the Texas Medicaid Provider Procedures Manual.

izes states, at their option, to provide incentive payments to Medicaid providers for the meaningful use of certified electronic health record (EHR) technology. On or after January 1, 2011, the Texas Health and Human Services Commission will implement a Medicaid EHR incentive payment program in accordance with the applicable provisions in 42 Code of Federal Regulations Part 495. The purpose of the incentive program is to promote the adoption and meaningful use of interoperable health information technology and qualified electronic health records. Detailed information on how to qualify for this program and receive EHR incentive payments will be found in the Texas Medicaid Provider Procedures Manual.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2010.

TRD-201005345

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §358.107

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §358.107, concerning coverage groups, in Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities.

Background and Justification

The purpose of the amendment is to add the Medicaid Buy-In for Children program (MBIC) to the list of Medicaid-funded programs for the elderly and people with disabilities covered under the Texas State Plan for Medical Assistance. The list in §358.107 names both optional and mandatory coverage groups. MBIC is an optional coverage group allowed under the federal Deficit Reduction Act of 2005. The Texas Legislature authorized and funded the implementation of MBIC in Texas in Senate Bill 187, 81st Legislature, 2009, Regular Session. The program helps pay medical bills for children with disabilities whose families have too much income to get traditional Medicaid.

Eligibility rules for MBIC are being proposed elsewhere in this issue of the *Texas Register* under Title 1, Part 15, Chapter 361 of the Texas Administrative Code (1 TAC Chapter 361).

Section-by-Section Summary

The amendment to §358.107 adds new subsection (h), which states that HHSC may determine eligibility for a child with a disability who meets the criteria established in 1 TAC Chapter 361.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed

amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Small Business and Micro-business Impact Analysis

Ms. Rymal has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the amendment concerns eligibility of individuals and does not require businesses to alter their practices.

Public Benefit

Lawrence M. Parker, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the amendment is in effect, the anticipated public benefit expected as a result of enforcing the amendment is that children with disabilities whose families need help with their medical bills and meet the eligibility requirements will have the opportunity to apply for that help.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Angie Clouch, Medicaid Eligibility for the Elderly and People with Disabilities, MC-2090, 909 West 45th Street, Austin, Texas 78751, or by e-mail to angie.clouch@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for October 22, 2010, at 9:00 a.m. in Room 164 of the HHSC - MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778.

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas; and §531.02444, which requires HHSC to implement a Medicaid buy-in program for children with disabilities.

The amendment affects Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.107. Coverage Groups.

(a) - (g) (No change.)

(h) Medicaid Buy-In for Children. In accordance with §1902(cc) of the Social Security Act (42 U.S.C. §1396a(cc)) for this optional coverage group, HHSC may determine eligibility for a child with a disability who meets the criteria established in Chapter 361 of this title (relating to Medicaid Buy-In for Children Program).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005425

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 424-6900

CHAPTER 361. MEDICAID BUY-IN FOR CHILDREN PROGRAM

1 TAC §§361.101, 361.103, 361.105, 361.107, 361.109, 361.111, 361.113, 361.115, 361.117, 361.119

The Texas Health and Human Services Commission (HHSC) proposes new Chapter 361, governing the Medicaid Buy-In for Children Program (MBIC). Chapter 361 consists of new §361.101, concerning overview and purpose; §361.103, concerning definitions; §361.105, concerning applying and providing information; §361.107, concerning nonfinancial requirements; §361.109, concerning third-party resources; §361.111, concerning income; §361.113, concerning employer-sponsored health insurance; §361.115, concerning cost sharing; §361.117, concerning notice of eligibility determination and right to appeal; and §361.119, concerning medical effective date.

Background and Justification

The purpose of the new sections is to place in rule the eligibility requirements for MBIC. MBIC is a Medicaid buy-in program for children with disabilities who do not qualify for Supplemental Security Income (SSI) for a reason other than disability. A child does not have to have applied for SSI in order to meet eligibility requirements for MBIC. MBIC is an optional Medicaid eligibility coverage group allowed under the federal Deficit Reduction Act of 2005. The Texas Legislature authorized the implementation of MBIC in Texas in Senate Bill 187, 81st Legislature, 2009, Regular Session.

The new program helps pay medical bills for children with disabilities whose families have too much income to get traditional Medicaid. The family may be required to pay a monthly premium as a condition of eligibility. The amount of the premium is based on a sliding scale, dependent upon family income and whether the child is covered under a parent's employer-sponsored health insurance plan. The proposed new rules govern the MBIC eligibility requirements, including the calculation and payment of the monthly premium.

A related rule is proposed for amendment under Title 1, Chapter 358 of the Texas Administrative Code elsewhere in this issue of the *Texas Register*.

Section-by-Section Summary

Proposed new §361.101 provides the overview and purpose of MBIC, including the legal basis for the program and a statement that the rules will not jeopardize funding for HHSC under the American Recovery and Reinvestment Act of 2009.

Proposed new §361.103 provides the definitions of words and terms used in Chapter 361.

Proposed new §361.105 provides the application requirements for both initial and redetermination applications; and the requirement for an applicant or recipient to report changes that might affect eligibility.

Proposed new §361.107 provides the nonfinancial eligibility requirements for MBIC, including citizenship and immigration status, disability, age, and living arrangement.

Proposed new §361.109 requires an applicant or recipient to comply with third-party resource requirements.

Proposed new §361.111 provides the income eligibility requirements for MBIC, including income limits, the definition of countable income, and how HHSC determines a family's countable income for the purpose of determining eligibility.

Proposed new §361.113 requires a parent of an applicant or recipient living in the same household as the applicant or recipient to participate in the parent's employer-sponsored health insurance plan, if a plan is available and meets certain conditions.

Proposed new §361.115 provides the requirements governing monthly premiums, hardship waivers, and cost-share limits.

Proposed new §361.117 governs an applicant's or recipient's right to receive notice of HHSC's eligibility decision or a change in the family's monthly premium amount. The notice is to include information about the applicant's or recipient's right to appeal an HHSC decision.

Proposed new §361.119 governs the medical effective date and states that the medical effective date for MBIC cannot predate January 1, 2011. The medical effective date is the date on which a person's MBIC coverage begins (including the three months before the application month).

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed new sections are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government is an estimated additional cost of \$.2 million general revenue and \$.4 million all funds in fiscal year (FY) 2010; \$10.9 million general revenue and \$31.0 million all funds in FY 2011; \$33.8 million general revenue and \$97.3 million all funds in FY 2012; \$46.2 million general revenue funds and \$132.0 million all funds in FY 2013; \$50.5 million general revenue funds and \$143.5 million all funds in FY 2014; and \$55.5 million general revenue and \$156.1 million all funds in FY 2015.

Small Business and Micro-business Impact Analysis

Ms. Rymal has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the rules govern a person's eligibility for a Medicaid program and will not require businesses to alter their practices.

There is no anticipated negative impact on local employment.

Public Benefit

Lawrence M. Parker, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the new sections are in effect, the anticipated public benefit expected as a result of enforcing the new sections is that children with disabilities whose families need help with their medical bills and meet the MBIC eligibility requirements will have the opportunity to apply for that help.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Angie Clouch, Health and Human Services Commission, Medicaid Eligibility for the Elderly and People with Disabilities, MC-2090, 909 West 45th Street, Austin, Texas 78751, or by e-mail to angie.clouch@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for October 22, 2010, at 9:00 a.m. in Room 164 of the HHSC - MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778.

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas; and §531.02444, which requires HHSC to implement a Medicaid buy-in program for children with disabilities.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§361.101. Overview and Purpose.

(a) This chapter governs the eligibility requirements for Medicaid Buy-In for Children (MBIC), which is authorized under §531.02444 of the Texas Government Code. MBIC provides Medicaid

benefits under the option explained in §1902(cc) of the Social Security Act (42 U.S.C. §1396a(cc)).

(b) MBIC is a Medicaid buy-in program for children with disabilities administered by the Texas Health and Human Services Commission (HHSC). It provides Medicaid benefits to eligible children with disabilities who are not eligible for Supplemental Security Income (SSI) for reasons other than disability. A child does not have to have applied for SSI in order to meet eligibility requirements for MBIC.

(c) Nothing in these rules shall be construed to violate the maintenance of eligibility requirements of section 5001 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) and make eligibility standards, methodologies, or procedures under the Texas State Plan for Medical Assistance (or any waiver under section 1115 of the Social Security Act (42 U.S.C. §1315)) more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) that were in effect on July 1, 2008.

§361.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A person seeking Medicaid benefits under MBIC who is not currently receiving Medicaid services.

(2) Authorized representative--An individual:

(A) who assists and represents a person in the application or eligibility redetermination process, and who is familiar with that person and that person's financial affairs; or

(B) who is a representative payee for an applicant or recipient for another federal benefit.

(3) CFR--Code of Federal Regulations.

(4) Child--An unmarried person under 19 years of age.

(5) Child with disabilities--A child who meets the Supplemental Security Income (SSI) program's definition of disability for children, as explained in 20 CFR §416.906.

(6) Eligibility certification month--Month in which MBIC eligibility is established.

(7) Family--A unit consisting of an applicant or recipient and the applicant's or recipient's parents and siblings who live in the same household as the applicant or recipient.

(8) Federal Poverty Level (FPL)--The household income guidelines issued annually and published in the Federal Register by the U.S. Department of Health and Human Services. Percentages of these guidelines are used to determine income eligibility for MBIC and certain other public assistance programs. In other programs, the FPL may be referred to as the Federal Poverty Income Level or the Federal Poverty Guidelines.

(9) HHSC--The Texas Health and Human Services Commission.

(10) Income--Funds a person receives that can be used to meet his or her need for food or shelter.

(11) In-kind support and maintenance--The value of food or shelter furnished to an applicant's or recipient's family.

(12) Intermediate care facility for persons with mental retardation (ICF/MR)--A Medicaid-certified facility that provides care in a 24-hour specialized residential setting for persons with mental retardation or a related condition. An ICF/MR includes a state supported living center and a state center.

(13) MBIC--Medicaid Buy-In for Children. A Medicaid buy-in program that provides Medicaid benefits to children with disabilities who are not eligible for SSI for reasons other than disability.

(14) Medicaid--A state and federal cooperative program, authorized under Title XIX of the Social Security Act and the Texas Human Resources Code, that pays for certain medical and health care costs for people who qualify. Also known as the medical assistance program.

(15) Parent--A child's natural or adoptive parent or the spouse of the natural or adoptive parent.

(16) Premium--A monthly payment to be made by a family to HHSC or its designee to buy MBIC coverage.

(17) Recipient--A person receiving Medicaid benefits under MBIC, including a person whose Medicaid eligibility is being redetermined.

(18) Sibling--A child's unmarried brother or sister (natural, adoptive, or step).

(19) U.S.C.--United States Code.

§361.105. Applying and Providing Information.

(a) A person or the person's authorized representative applies for MBIC by completing an application prescribed by HHSC and submitting it to HHSC in accordance with HHSC instructions. The date of receipt of the completed signed application by HHSC is the application filing date, which establishes the application month explained in §361.119 of this chapter (relating to Medical Effective Date).

(b) An applicant or authorized representative must provide HHSC with all requested documentation and information that HHSC determines is necessary to make an eligibility determination or calculate a monthly premium. If the applicant or authorized representative fails or refuses to provide requested information by the date specified in a written request from HHSC, HHSC may deny the application for failure to furnish information. When this occurs but the person later provides the requested information, the date that the requested information is provided to HHSC becomes the application filing date explained in subsection (a) of this section.

(c) HHSC notifies a recipient in writing when it is time to redetermine the recipient's eligibility. This usually occurs once per year, although HHSC may require a person to send in documentation and information more often if HHSC determines that a special review of the person's eligibility is appropriate. A recipient must provide requested documentation and information when HHSC sends written notice of the requirement to the recipient's case address of record. The written notice explains the deadline to provide the information. If a recipient fails to provide the information by the deadline stated in the written notice, HHSC may terminate the recipient's MBIC eligibility.

(d) An applicant or recipient must report to HHSC within 10 calendar days any information that may impact the person's eligibility or monthly premium amount, in accordance with 42 U.S.C. §1383(e)(1)(A).

§361.107. Nonfinancial Requirements.

(a) Citizenship, immigration status, and residency. To be eligible for MBIC, a child must meet the citizenship, immigration status, and residency requirements in Chapter 358, Subchapter B of this title (relating to Nonfinancial Requirements).

(b) Disability. To be eligible for MBIC, a child must meet the Supplemental Security Income program's definition of disability for children, as explained in 20 CFR §416.906.

(c) Age. A child is eligible for MBIC through the month of his or her 19th birthday, if the child meets all other eligibility criteria.

(d) Marital status. To be eligible for MBIC, a child must not be married.

(e) Living arrangement.

(1) An applicant or recipient must not reside in a public institution, including a jail, prison, reformatory, or other correctional or holding facility, as defined in 42 CFR §435.1009 and §435.1010.

(2) If a recipient enters a nursing facility or intermediate care facility for persons with mental retardation, HHSC does not process the denial of MBIC Medicaid until eligibility for the appropriate institutional Medicaid program is determined.

(f) Social security number. In accordance with 42 CFR §435.910, a child or the child's authorized representative must give the child's social security number to HHSC as a condition of eligibility for MBIC.

(g) Application for other benefits. To be eligible for MBIC, a child or the child's authorized representative must apply for and obtain, if eligible, all other benefits to which the person may be entitled, in accordance with 42 U.S.C. §1382(e)(2).

§361.109. Third-party Resources.

Medicaid is considered the payor of last resort for a person's medical expenses. As a condition of eligibility, in accordance with 42 CFR §§433.138 - 433.148, an applicant or recipient must:

(1) assign to HHSC the applicant's or recipient's right to recover any third-party resources available for payment of medical expenses covered under the Texas State Plan for Medical Assistance; and

(2) report to HHSC any third-party resource within 60 days after learning about the third-party resource.

§361.111. Income.

(a) To be eligible for MBIC, a child's family must have monthly countable income less than or equal to 150% of the Federal Poverty Level (FPL).

(b) Countable income means:

(1) earned income for purposes of the Supplemental Security Income (SSI) program minus all applicable exclusions and exemptions, as explained in 20 CFR §§416.1110 - 416.1112; and

(2) unearned income for purposes of the SSI program minus all applicable exclusions and exemptions, as explained in 20 CFR §§416.1120 - 416.1124, except HHSC does not count in-kind support and maintenance as income.

(c) To determine the family's monthly countable income, HHSC counts the income of the child applying for or receiving MBIC, the income of the child's parents living in the same household as the child, and the income of the child's ineligible siblings living in the same household as the child.

(1) For a stepparent's income to count, the stepparent must be the current husband or wife of a natural or adoptive parent living in the same household as the child and the natural or adoptive parent.

(2) A sibling's income counts through the month of the sibling's:

(A) 18th birthday; or

(B) 22nd birthday, if the sibling is, as determined by HHSC, regularly attending school, college, or job training.

(3) HHSC calculates the family's monthly countable income as follows:

(A) Total the following:

(i) Monthly countable income of the child applying for or receiving MBIC.

(ii) Combined monthly countable income of the child's parents.

(iii) Countable monthly income of each of the child's ineligible siblings that is in excess of 150% of the FPL for a household of one, multiplied by 2, plus \$85.

(B) Subtract \$85 from the total arrived at in subparagraph (A) of this paragraph.

(C) Divide the total arrived at in subparagraph (B) of this paragraph by 2.

§361.113. Employer-sponsored Health Insurance.

As a condition of a child's eligibility for MBIC, a parent of an applicant or recipient living in the same household as the applicant or recipient must apply for, enroll in, and pay any required premiums for an employer-sponsored health insurance plan, if the parent's employer:

(1) offers family coverage under a group health plan that covers the applicant or recipient; and

(2) contributes at least 50 percent of the total cost of annual premiums.

§361.115. Cost Sharing.

(a) Monthly premium requirements for the months after the eligibility certification month. After HHSC establishes MBIC eligibility, HHSC or its designee sends the recipient written notice of the monthly premium amount and the due date for the monthly premium payment. HHSC provides a grace period of 60 days from the date on which the monthly premium is past due for the recipient to pay the monthly premium, in accordance with 42 U.S.C. §1396o(i)(3). If HHSC does not receive a monthly premium payment within the grace period, then HHSC terminates MBIC eligibility, effective the first day of the month after the grace period ends.

(b) Monthly premium requirements for the three months prior to the application month. As described in §361.119 of this chapter (relating to Medical Effective Date), an applicant may receive MBIC coverage for up to three months prior to the application month if the applicant meets the MBIC eligibility requirements. A month prior to the application month is a retroactive month. Prior to certifying MBIC eligibility for a retroactive month, HHSC or its designee sends the applicant written notice of the monthly premium amount for each eligible retroactive month and the due date for the monthly premium payment. HHSC provides the applicant at least 60 days to submit the premium payment for eligible retroactive months, in accordance with 42 U.S.C. §1396o(i)(3). HHSC or its designee must receive, by the due date, a full premium payment for at least one of the eligible retroactive months to certify MBIC eligibility for a retroactive month. If HHSC or its designee receives a premium payment that is less than the total amount due for all of the eligible retroactive months, then HHSC or its designee applies the amount to the eligible retroactive months in reverse chronological order.

(c) Monthly premium amounts. HHSC determines the monthly premium amounts on a sliding scale based on total monthly income as described in §361.111(c)(3)(A) of this chapter (relating to Income).

(1) For a recipient who is not enrolled in employer-sponsored health insurance, HHSC establishes full monthly premium amounts, up to the maximum amounts allowed by federal law.

(2) For a recipient who is enrolled in employer-sponsored health insurance and who receives premium assistance from HHSC under §1906 of the Social Security Act (42 U.S.C. §1396e), HHSC establishes reduced monthly premium amounts.

(d) Monthly premium amounts for a family with more than one MBIC recipient. If there is more than one MBIC recipient in a family, the family pays only one monthly premium amount.

(e) Undue hardship waivers. HHSC may, in its discretion, waive monthly premiums for undue hardship. HHSC determines eligibility for the undue hardship waivers described in paragraphs (1), (2), and (3) of this subsection based on information provided at application or information provided as described in §361.105 of this chapter (relating to Applying and Providing Information). A recipient must apply for the undue hardship waiver described in paragraph (4) of this subsection. HHSC does not waive monthly premiums for any months prior to the application month.

(1) A recipient who is an American Indian or Alaska Native as defined in 25 U.S.C. §§1603(c), 1603(f), 1679(b) or who has been determined eligible, as an Indian, pursuant to 42 CFR §136.12 or Title V of the Indian Health Care Improvement Act, to receive health care services is exempt from monthly premiums for the duration of enrollment in MBIC.

(2) A recipient who is enrolled in employer-sponsored health insurance, as determined by HHSC, and who does not receive premium assistance from HHSC under §1906 of the Social Security Act (42 U.S.C. §1396e) is exempt from monthly premiums for MBIC as long as the recipient remains enrolled in employer-sponsored health insurance and is not receiving premium assistance.

(3) A recipient residing in a federally declared disaster area is exempt from monthly premiums for three months beginning with the month in which the disaster is declared. A recipient may only receive one undue hardship waiver per disaster.

(4) A recipient or authorized representative may apply for an undue hardship waiver for loss of income.

(A) HHSC may grant an undue hardship waiver for loss of income if the loss of income is due to:

(i) termination of employment because of a layoff or business closing;

(ii) an involuntary reduction in work hours;

(iii) a parent leaving the household because of divorce or separation; or

(iv) a parent's death.

(B) A recipient who is determined by HHSC to be eligible for an undue hardship waiver for loss of income may be exempt from monthly premiums for three months.

(C) A recipient may only receive one undue hardship waiver for loss of income per 12 months.

(D) An undue hardship waiver for loss of income begins the first month for which HHSC or its designee did not receive a premium payment for the recipient.

(f) Cost-share limits. A recipient is exempt from monthly premiums for the remainder of the coverage period when the cost-share expenditures for the recipient reach the cost-share limit. HHSC deter-

mines the cost-share limit for a recipient, up to the maximum allowed by 42 U.S.C. §1396o(i)(2)(A).

(g) Tracking cost-share expenditures. For a recipient without employer-sponsored health insurance, HHSC or its designee determines when MBIC premium payments reach the cost-share limit. A recipient with employer-sponsored health insurance must track cost-share expenditures on the form provided by HHSC or its designee and report to HHSC or its designee when the annual cost-share limit is reached. Eligible cost-share expenditures include the monthly premiums for MBIC and cost sharing for employer-sponsored health insurance. HHSC or its designee:

(1) computes the cost-share limit for each recipient and informs the recipient of the cost-share limit at enrollment;

(2) provides the recipient with a form for keeping track of monthly premiums for MBIC and cost sharing for employer-sponsored health insurance; and

(3) provides a refund if HHSC receives a monthly premium payment that causes the recipient to exceed the cost-share limit.

§361.117. Notice of Eligibility Determination and Right to Appeal.

(a) After making an eligibility determination on an initial application, HHSC sends the applicant:

(1) a written notice of eligibility, including notice of any monthly premium requirements and the medical effective date described in §361.119 of this subchapter (relating to Medical Effective Date); or

(2) a written notice of ineligibility and the reason for the decision.

(b) After making an eligibility determination or redetermination, HHSC sends the recipient a written notice of any change in eligibility or monthly premium requirement.

(c) The written notice informs the applicant or recipient of the right to request a hearing to appeal HHSC's decision. The hearing is held in accordance with 42 CFR Part 431, Subpart E and HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

§361.119. Medical Effective Date.

(a) Beginning with the three months before the application month, except as described in subsection (b) of this section, the medical effective date for MBIC coverage is the first day of the first month in which a person meets all eligibility criteria.

(b) The medical effective date for MBIC cannot predate January 1, 2011.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005426

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 424-6900

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CHAPTER 392. PROCUREMENTS
BY HEALTH AND HUMAN SERVICES
COMMISSION
SUBCHAPTER J. HISTORICALLY
UNDERUTILIZED BUSINESSES

1 TAC §392.100

The Texas Health and Human Services Commission (HHSC) proposes to amend §392.100, concerning Historically Underutilized Business Program.

Background and Justification

Pursuant to §2161.003 of the Texas Government Code, state agencies are required to adopt the Texas Comptroller of Public Accounts (CPA) rules governing the use of historically underutilized businesses (HUBs) for construction projects and purchases of goods and services paid for with state-appropriated funds. Section 392.100 currently adopts obsolete rules of the Texas Building and Procurement Commission (TBPC). TBPC was the governing authority for the statewide HUB program until the 80th Texas Legislature, in House Bill 3560, moved that authority to the CPA. The proposed amendment will ensure that HHSC's rule reflects the correct governing authority and rule citation for the statewide HUB program.

Section-by-Section Summary

The proposed amendment replaces references to the TBPC with references to the CPA. The rule reference is changed to 34 Texas Administrative Code (TAC) Chapter 20, Subchapter B. Subsection (b) of the current section is not necessary and has been removed. The reference to the statutory authority in subsection (c) has been moved to implied subsection (a).

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed amendment is in effect there will be no fiscal impact to state government. The proposed amendment will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposed amendment, because they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed amendment. There is no anticipated negative impact on a local economy.

Public Benefit

Rolando Garza, Deputy Executive Commissioner for System Support Services, and Robert L. Hall, Administrative Services Development Director, have determined that for each year of the first five years this section is in effect, the public will benefit from adoption of this amendment. The anticipated public benefit, as a result of enforcing the section, is that HHSC's HUB rule will be in compliance with the current statute.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government

Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be mailed to Sharon Addison, HUB/Procurement Team Lead, Administrative Services Development, Health and Human Services Commission, 4900 North Lamar Boulevard, MC 3200, Austin, Texas 78751-2316; by fax to (512) 424-6590; or by e-mail to sharon.addison@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; and under Texas Government Code §2161.003, which directs state agencies to adopt the CPA's rules under 34 TAC Chapter 20, Subchapter B, relating to the Historically Underutilized Business Program.

The amendment implements Texas Government Code §2161.003. No other statutes, articles, or codes are affected by this proposal.

§392.100. Historically Underutilized Business Program.

[(a)] In compliance with Texas Government Code, §2161.003, HHSC adopts by reference the Texas Comptroller of Public Accounts [Building and Procurement Commission] rules found at 34 Texas Administrative Code Chapter 20, Subchapter B [1 TAC, Title 4 Administration, Part 5 Texas Building and Procurement Commission, Chapter 111 Executive Administration Division, Subchapter B Historically Underutilized Business Program, §§111.11-111.16 and §§111.26-111.28,] (relating to [the] Historically Underutilized Business Program) [- with the additions set forth in subsection (b) below].

[(b)] For purposes of this §392.100:}

[(1)] "Commission" refers to the Texas Building and Procurement Commission.}

[(2)] "State agency" refers to the Health and Human Services Commission.}

[(c)] The adoption of this rule is required by Government Code, §2161.003.}

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005424

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

**CHAPTER 153. SCHOOL DISTRICT
PERSONNEL**

**SUBCHAPTER CC. COMMISSIONER'S
RULES ON CREDITABLE YEARS OF SERVICE**

19 TAC §153.1022

The Texas Education Agency proposes an amendment to §153.1022, concerning the minimum salary schedule for certain professional staff. The section establishes definitions of qualifying staff, details eligibility criteria for placement on the salary schedule, and explains the base pay. The proposed amendment would update the rule to modify the calculation of the minimum salary schedule prescribed by the TEC, §21.402, as amended by House Bill (HB) 3646, 81st Texas Legislature, Regular Session, 2009.

The commissioner is authorized to adopt a minimum monthly salary schedule for certain professionals, including classroom teachers, full-time librarians, full-time counselors, and full-time nurses. The salary schedule is based on the employee's level of experience. In accordance with the TEC, §21.402, enacted by Senate Bill 4, 76th Texas Legislature, 1999, 19 TAC §153.1022 was adopted to be effective January 2, 2000. The section establishes definitions of qualifying staff, details eligibility criteria for placement on the salary schedule, and explains the base pay. Salaries are adjusted using a factor, defined as "FS" in the Texas Education Code (TEC), §21.402(a), based on state assistance under the TEC, §42.302. The rule was last amended in 2006 to incorporate a new element in the determination of "FS" and to specify salary rates applicable for the 2006-2007 and 2007-2008 school years. The current proposed amendment would update the rule to modify the calculation of the minimum salary schedule for the 2009-2010 and 2010-2011 school years prescribed by the TEC, §21.402, as amended by HB 3646, 81st Texas Legislature, Regular Session, 2009.

In June 2009, the 81st Texas Legislature, amended the TEC, §21.402, providing for increases in the minimum salary schedule for the 2009-2010 school year. The changes in statute increased the minimum salary schedule by the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in weighted average daily attendance (WADA), then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of \$60 multiplied by the WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405. The proposed amendment to 19 TAC §153.1022 would update the rule in response to statutory changes, as follows.

Subsection (a) would be revised to add a definition for full-time speech pathologists.

Subsection (b) would be revised to delete school years 2005-2006 and 2006-2007 as base years and delete the \$250 per month pay increase. The revision would reflect the 2008-2009 adopted local salary schedule as the base year for the 2009-2010 and 2010-2011 school years, pursuant to Attorney General Opinion No. GA-0785. The revision would also incorporate language relating to the salary increase mandated by HB 3646, 81st Texas Legislature, Regular Session, 2009. In addition, language would be added in subsection (b) to include eligibility for full-time speech pathologists to receive the state-mandated pay raise during the 2009-2010 and 2010-2011 school years.

Subsection (c) would be revised to correspond with changes in HB 3646, 81st Texas Legislature, Regular Session, 2009.

Subsection (d) would be revised to change the reference from the 2006-2007 school year to the 2009-2010 and 2010-2011 school years. In addition, the table set forth as Figure: 19 TAC §153.1022(d) would be updated to include the annual salary amounts for 10-month contracts. The state-proposed minimum salary schedule for the 2009-2010 and 2010-2011 school years does not reflect the uniform monthly amount determined by computing \$80 or the \$60/WADA calculation mandated under HB 3646 and, therefore, will not reflect the actual salaries paid by districts across the state.

The proposed amendment would have no reporting implications. Regarding procedural implications, the TEA would retrieve any necessary information such as number of full-time classroom teachers, full-time librarians, full-time counselors, full-time nurses, and full-time speech pathologists from data already collected through PEIMS. The proposed amendment would have no new locally maintained paperwork requirements.

Jerel Booker, associate commissioner for educator and student policy initiatives, has determined that for the first five-year period the amendment is in effect there will be significant fiscal implications for state (TEA and Teacher Retirement System (TRS)) and local governments (school districts and open-enrollment charter schools) as a result of enforcing or administering the amendment.

The proposed amendment may result in some associated costs to the state. These costs are the outcomes of the state mandated pay raise, \$80 or \$60/WADA, and the constitutional requirements for the state to make contributions to the TRS on behalf of certain school district employees (Section 82, HB 3646). The proposed amendment would recognize the revenues provided through TRS savings and the additional appropriations of \$80 or \$60/WADA, for each year of the biennium, by HB 3646, 81st Texas Legislature, Regular Session, 2009. However, school districts are encouraged to use these revenues to offset any costs associated with these proposed increases in the 2009-2010 and 2010-2011 salary structures.

Implications for the TEA

For the 2009-2010 school year, the additional cost to the state may range between \$353,530,832 and \$358,564,013 depending on the reported number of classroom teachers, full-time librarians, full-time counselors, full-time speech pathologists, and full-time nurses. The difference between the \$353,530,832 and \$358,564,013 for the 2009-2010 school year depends on the actual number of WADA reported to the TEA and the number of districts that may be in the \$80 or \$60/WADA pay raise category.

For the 2010-2011 school year the estimate would increase by 10%, assuming the number of eligible employees would increase by 10% during the second year of the biennium. The additional cost to the state for the 2010-2011 school year may range between \$388,883,915 and \$394,420,414 depending on the actual number of WADA reported to TEA and the number of districts that may be in the \$80 or \$60/WADA pay raise category.

Implications for the TRS

Since the additional pay raise under the TEC, §21.402(c-1), mandated by HB 3646 is not considered as part of the statutory minimum, the TRS may receive an estimated additional \$23,488,588 due to the increase in the TRS contribution during the 2009-2010 school year and an estimated \$26,205,592 during the 2010-2011 school year. These numbers were generated using an estimated 334,186 eligible employees for the 2009-2010 school year and 367,604 for the 2010-2011 school year, respectively, assuming an estimated 10% increase in eligible employees between the first and second year of the biennium. The TRS factor used in this calculation is 6.644%.

The TRS may receive additional funds during the 2009-2010 and 2010-2011 school years depending on the number of school districts that may be adopting a salary schedule higher than the statutory minimum; therefore, this cost estimate cannot be provided at this time.

Implications for school districts, including open-enrollment charter schools

Due to the passage of Section 82 of HB 3646, the statutory minimum savings generated by this mandate to districts may range between \$19,947,745 during the 2009-2010 school year and \$21,942,520 for the 2010-2011 school year, assuming a 10% increase between the first and the second year of the biennium. These estimated funds were calculated using 25,000 school district employees that may be affected by this bill and reported to TRS under the statutory minimum for TRS purposes.

In addition, school districts may be required to pay additional contributions to TRS associated with local increments paid above the state-mandated minimum salary schedule depending on the number of school districts that may be adopting a salary schedule higher than the statutory minimum. A rate of 6.644% district on-behalf contributions were used for this estimate. At the present time, there are no reliable data concerning the local share above the statutory minimum salary schedule for the 2009-2010 and 2010-2011 school years. Therefore, the cost estimate cannot be calculated at this time.

Mr. Booker has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be clarification of terminology and requirements relating to the minimum salary schedule for certain professional staff. There may be fiscal implications for persons who are required to comply with the proposed amendment.

Implications for persons

School district employees may incur additional costs as a result of this pay raise. Such costs may be the result of the employees' increased TRS contribution portion and/or any additional employees' costs associated with the pay increase. Additional costs, associated with the mandated pay raise, may be charged against the employees' net monthly salary (i.e., federal income tax on the additional income). The anticipated costs for individuals would be \$63,635,549 for fiscal year 2010; \$66,021,882 for

fiscal year 2011; \$68,408,216 for fiscal year 2012; \$70,794,549 for fiscal year 2013, and \$73,180,882 for fiscal year 2014. These amounts are estimated using an 18% tax bracket (after all pre-tax deductions are made) and assuming yearly incomes are increased by 2.5% every year thereafter. It is assumed that these additional costs are offset by the mandated pay raise.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 1, 2010, and ends November 1, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 1, 2010.

The amendment is proposed under the Texas Education Code, §21.402, which authorizes the commissioner of education to adopt rules to govern the application of the minimum salary schedule for certain professional staff.

The amendment implements the Texas Education Code, §21.402.

§153.1022. Minimum Salary Schedule for Certain Professional Staff.

(a) Definitions and eligibility. The following definitions and eligibility criteria apply to the increases in the minimum salary schedule in accordance with Texas Education Code (TEC), Chapter 21.

(1) The staff positions that qualify for the salary increase include classroom teachers and full-time librarians, counselors, and nurses employed by public school districts and who are entitled to a minimum salary under TEC, §21.402.

(A) A classroom teacher is an educator who teaches an average of at least four hours per day in an academic or career and technology instructional setting pursuant to TEC, §5.001, focusing on the delivery of the Texas essential knowledge and skills and holds the relevant certificate issued by the State Board for Educator Certification (SBEC) under the provisions of TEC, Chapter 21, Subchapter B. Although non-instructional duties do not qualify as teaching, necessary functions related to the educator's instructional assignment such as instructional planning and transition between instructional periods should be applied to creditable classroom time.

(B) A school librarian is an educator who provides full-time library services and holds the relevant certificate issued by the SBEC under the provisions of TEC, Chapter 21, Subchapter B.

(C) A school counselor is an educator who provides full-time counseling and guidance services under the provisions of TEC, Chapter 33, Subchapter A, and holds the relevant certificate issued by the SBEC pursuant to the provisions of TEC, Chapter 21, Subchapter B.

(D) A school nurse is an educator employed to provide full-time nursing and health care services and who meets all the requirements to practice as a registered nurse (RN) pursuant to the Nursing Practice Act and the rules and regulations relating to professional nurse education, licensure, and practice and has been issued a license to practice professional nursing in Texas.

(E) A speech pathologist is an educator employed to provide full-time speech pathology services and who meets all the requirements to practice as a speech pathologist pursuant to the rules and regulations relating to professional speech pathology education, licensure, and practice and has been issued a license to practice professional speech pathology in Texas. This definition encompasses all speech pathologists that have been licensed by the Texas Education Agency, ending August 31, 1996, and by the Health and Human Services Commission, beginning September 1, 1996. This subparagraph expires September 1, 2011.

(2) An eligible educator who is employed by more than one district in a shared service arrangement or by a single district in more than one capacity among any of the eligible positions qualifies for the salary increase as long as the combined functions constitute full-time employment.

(3) Full-time means contracted employment for at least ten months (187 days) for 100% of the school day in accordance with definitions of school day in TEC, §25.082, employment contract in TEC, §21.002, and school year in TEC, §25.081.

(4) A local supplement is any amount of pay above the state minimum salary schedule for duties that are part of a teacher's classroom instructional assignment.

(5) Current placement on the salary schedule means a placement based on years of service recognized for salary increment purposes up to the current year.

(6) Salary schedule means a system of providing routine salary increases based upon an employee's total teaching experience and/or an employee's longevity in a school district.

(b) Base monthly salary for the 2009-2010 and 2010-2011 school years. The base monthly salary is the monthly salary the employee received during the 2008-2009 school year, provided the district has adopted a 2008-2009 local salary schedule for those eligible individuals. Each eligible individual must be paid, at a minimum, the amount that was received on the 2008-2009 local salary schedule, for their level of creditable years of experience, pursuant to §153.1021 of this title (relating to Recognition of Creditable Years of Service). This amount includes any local supplement and any money representing a career ladder supplement the employee would have received on the district's salary schedule during the 2009-2010 and 2010-2011 school years, and the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in weighted average daily attendance (WADA), then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of \$60 multiplied by the number of students in WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405. [Base monthly salary for the 2006-2007 school year. The base monthly salary is the monthly salary the employee would have received for the 2006-2007 school year under the district's salary schedule for the 2005-2006 school year, if that schedule had been in effect for the 2006-2007 school year, including any local supplement and any money representing a career ladder supplement the employee would have received in the 2006-2007 school year, and \$250 per month.]

(1) An educator eligible for the salary increase is entitled to a minimum salary in the 2009-2010 and 2010-2011 school years [2006-2007 school year] equal to the greater of the salary corresponding to their current placement on the state salary schedule pursuant to TEC, §21.402(a), or the salary corresponding to their current placement on the employing district's 2008-2009 [2006-2007] salary sched-

ule, provided the district has adopted a 2008-2009 local salary schedule, plus the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in WADA, then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly pay raise amount, the product of \$60 multiplied by the number of students in WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405 [\$250 per month]. If employed by the same district, the minimum must include any local and career ladder supplements the employee would have received in the 2008-2009 school year [2006-2007]. (Attorney General Opinion No. GA-0785)

(2) Eligible full-time counselors, full-time nurses, and full-time librarians are entitled to a minimum salary in the 2009-2010 and 2010-2011 school years [2006-2007 school year] equal to the greater of the salary corresponding to their current placement on the state salary schedule pursuant to TEC, §21.402(a), or the salary corresponding to their current placement on the employing district's 2008-2009 [2006-2007] salary schedule, provided the district has adopted a 2008-2009 local salary schedule, plus the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in WADA, then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of \$60 multiplied by the number of students in WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405 [\$250 per month]. These eligible employees [educators] are placed on the state schedule according to the same criteria that applies to classroom teachers and full-time librarians pursuant to §153.1021 of this title [(relating to Recognition of Creditable Years of Service)].

(3) Eligible speech pathologists are entitled to receive the monthly salary they received during the 2008-2009 school year, under the district's salary schedule, as if that schedule had been in effect for the 2009-2010 and 2010-2011 school years, including any local supplement, plus the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in WADA, then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of \$60 multiplied by the number of students in WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405. This paragraph expires September 1, 2011.

(4) [(3)] A beginning eligible employee [teacher] who has not previously been on the state salary schedule is entitled to any local supplement that would have been offered to a beginning eligible employee [teacher] on the employing district's 2008-2009 [2006-2007] salary schedule, including the pay raise that was mandated by House Bill 3646, 81st Texas Legislature, 2009, for the 2009-2010 school year (the greater of \$80 per month or an amount that represents \$60 multiplied by the number of students in WADA), as if that schedule had been in effect during the 2009-2010 and 2010-2011 school years. (Attorney General Opinion No. GA-0785)

(5) [(4)] Educators who are eligible for the salary increase and who are employed for more than ten months are entitled to the greater of \$80 or a uniform monthly amount determined by multiplying \$60 by the number of students in WADA, then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of \$60 multiplied by the number of

students in WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405. These individuals are eligible for an increase in [an additional \$250 in increased] pay for each full month of additional service.

(6) [(5)] Classroom teachers [Teachers] who are eligible for the salary increase, pursuant to TEC, §5.001, but who are not employed full-time (work either less than 100% of the day or for a portion of the year) are entitled to a proportionate pay increase. For classroom teachers working less than 100% of the day, the increase is proportionate to the percent of the day employed. For classroom teachers employed less than a full year, the increase is valid only for the months employed.

(7) [(6)] Full-time nurses [Nurses], full-time librarians, full-time speech pathologists, and full-time counselors who are employed for less than a full school year or who are placed in an eligible assignment for less than a full school year are entitled to a pay increase in proportion to the months employed in which they are eligible.

(c) Determination of "FS." "FS" is the amount, as determined by the commissioner under TEC, §21.402(b), of state and local funds per weighted student, including funds provided under TEC, §42.2516, [§42.2516(b)(1)(B), but not funds provided under TEC, §42.2516(b)(1)(A), (b)(1)(C), (b)(2), or (b)(3);] available to a district eligible to receive state assistance under TEC, §42.302, with a maintenance and operations tax rate per \$100 of taxable value equal to the product of the state compression percentage, as determined under TEC, §42.2516, multiplied by \$1.50, except that the amount of state and local funds per weighted student does not include the amount attributable to the increase in the guaranteed level made by Chapter 1187, Acts of the 77th Texas Legislature, Regular Session, 2001.

(d) Monthly minimum salary rates. The minimum monthly salary rates applicable for the 2009-2010 and 2010-2011 school years [2006-2007 school year], in accordance with this section and TEC, §21.402, shall be as set forth in the table in this subsection.

Figure: 19 TAC §153.1022(d)
[Figure: 19 TAC §153.1022(d)]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 20, 2010.

TRD-201005429

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 475-1497



TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.5

The Texas Medical Board (Board) proposes amendments §172.5, concerning Visiting Physician Temporary Permits (VPTP).

The amendment provides that applicants for KSTAR permits who have prior or current disciplinary orders from a licensing entity related to professional boundaries or have been convicted a felony are not eligible for a permit unless otherwise determined by the Board.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to establish additional standards for obtaining a KSTAR VPTP that include patient protections.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §§153.001, 155.009, and 155.101, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§172.5. Visiting Physician Temporary Permits.

(a) Visiting Physician Temporary Permit - General.

(1) The executive director of the board may issue a permit to practice medicine to an applicant who intends to practice under the supervision of a licensed Texas physician, excluding training in postgraduate training programs, for educational purposes or in order to practice charity care to underserved populations in Texas. In order to be determined eligible for a visiting physician temporary permit the applicant must:

(A) not have any medical license that is under restriction, disciplinary order, or probation in another state, territory, or Canadian province;

(B) be supervised by a physician with an unrestricted license in Texas;

(C) present written verification from the physician who will be supervising the applicant that the physician will provide continuous supervision of the applicant. Constant physical presence of the physician is not required but the physician must remain readily available; and

(D) present written verification from the supervising physician as to the purpose for the requested permit.

(2) Visiting physician temporary permits shall be valid for no more than ten working days and for a specified locale and purpose. The executive director of the board, in his/her discretion, may extend

the length of the temporary permit if the applicant shows good cause for why the extended time is needed.

(b) Visiting Physician Temporary Permit - KSTAR.

(1) The executive director of the board may issue a permit to practice medicine to an applicant who intends to participate in the Texas A&M KSTAR program. In order to be determined eligible for a visiting physician temporary permit, the applicant must:

~~[(A) not have been convicted of a felony or have any medical license that is or has been under restriction, disciplinary order, or probation in another state, territory, or Canadian province based on a professional boundary violation;]~~

(A) ~~[(B)]~~ present written verification from the KSTAR program of acceptance into the program;

(B) ~~[(C)]~~ be supervised by a physician with an unrestricted license in Texas; ~~[and]~~

(C) ~~[(D)]~~ present written verification from the physician who will be supervising the applicant that the physician will provide continuous supervision of the applicant. Constant physical presence of the physician is not required but the physician must remain readily available; ~~and [-]~~

(D) ~~not have been convicted of a felony or have any medical license that is or has been under restriction, disciplinary order, or probation in another state, territory, or Canadian province based on a professional boundary violation, unless otherwise determined eligible by the Board.~~

(2) Visiting physician temporary permits for participation in the KSTAR program shall be valid for the length of the program. The executive director of the board, in his/her discretion, may extend the length of the temporary permit if the applicant shows good cause for why the extended time is needed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mari Robinson, J.D.

Executive Director

Texas Medical Board

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For further information, please call: (512) 305-7016



PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.6

The Texas State Board of Pharmacy proposes amendments to §281.6, concerning Mental or Physical Examination. The proposed amendments, if adopted, clarify the requirements for men-

tal or physical examinations and add registrants as individuals subject to the rule.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that registrants may be subject to a mental or physical examination upon a finding of probable cause. It is difficult to determine the cost of a mental or physical examination since costs varying depending on the extent and the nature of the examination. It is estimated that examinations may range from \$100 - \$150. The effect on large, small or micro-businesses (pharmacies) will be the same as the economic cost to an individual, if the pharmacy chooses to pay the fee for the individual.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

The amendments are proposed under §§551.002, 554.051, 565.001(a)(4), 565.052, 568.003(a)(5), and 568.0036 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §565.001(a)(4) and §568.003(a)(5) gives the Board the authority to discipline an applicant or registrant if the individual has developed an incapacity. The Board interprets §565.052 and §568.0036 authorize the Board to request a licensee or applicant to submit to a mental or physical examination.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.6. Mental or Physical Examination.

For the purposes of the Act, §§565.001(a)(4), 565.052, 568.003(a)(5), and 568.0036, ~~[(§565.001(a)(4) and §565.052,)]~~ shall be applied as follows.

(1) The board may discipline an applicant, licensee, or registrant ~~[or licensee]~~ if the board finds that the applicant, licensee, or registrant ~~[or licensee]~~ has developed an incapacity ~~[a mental or physical incapacity]~~ that in the estimation of the board would prevent a pharmacist from engaging in the practice of pharmacy or a pharmacy technician or pharmacy technician trainee from practicing with a level of skill and competence that ensures the public health, safety, and welfare.

(2) Upon a finding of probable cause by the board or its designee ~~[probable cause]~~ that the applicant, licensee, or registrant ~~[or licensee]~~ has developed a mental or physical incapacity that in the estimation of the board would prevent a pharmacist from engaging in the practice of pharmacy or a pharmacy technician or pharmacy technician trainee from practicing with a level of skill and competence that ensures the public health, safety, and welfare, the following is applicable:

(A) The executive director/secretary, legal counsel of the agency, or other representative of the agency as designated by the executive director/secretary, shall request the applicant, licensee, or registrant ~~[or licensee]~~ to submit to a mental or physical examination by a physician or other healthcare professional designated by the board.

The individual providing the examination shall be approved by the board. Such examination shall be coordinated through the entity that contracts with the board to aid impaired pharmacists and pharmacy students. The applicant, licensee, or registrant shall follow the procedures of such entity for each examination conducted.

(B) The applicant, licensee, or registrant ~~[or licensee]~~ shall be notified in writing, by either personal service or certified mail with return receipt requested, of the request to submit to the examination.

(C) The applicant, licensee, or registrant ~~[or licensee]~~ shall submit to the examination within 30 days of the date of the receipt of the request.

(D) The applicant, licensee, or registrant ~~[or licensee]~~ shall authorize the release of the results of the examination and the results shall be submitted to the board within 15 days of the date of the examination.

(3) If the applicant, licensee, or registrant ~~[or licensee]~~ does not comply with the provisions of paragraph (2) of this section, the following is applicable.

(A) The executive director/secretary shall cause to be issued an order requiring the pharmacist or applicant to show cause why he/she will not submit to the examination.

(B) The executive director/secretary shall schedule a hearing before the board or the State Office of Administrative Hearings on the order, within 30 days after notice is served on the applicant, licensee, or registrant ~~[or licensee]~~.

(C) The applicant, licensee, or registrant ~~[or licensee]~~ shall be notified of the hearing by either personal service or certified mail with return receipt requested.

(D) At the hearing, the applicant, licensee, or registrant ~~[or licensee]~~ and if applicable, the applicant's, licensee's, or registrant's attorney ~~[or licensee's attorney]~~, are entitled to present any testimony and other evidence to show why the applicant, licensee, or registrant ~~[or licensee]~~ should not be required to submit to the examination. The applicant, licensee, or registrant has the burden of proof once probable cause has been established by the board, as required by §565.062 of the Act.

(E) After the hearing, the board shall issue an order either requiring the applicant, licensee, or registrant ~~[or licensee]~~ to submit to the examination, as specified in paragraph (2) of this section, or withdrawing the request for examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE

22 TAC §281.23, §281.31

The Texas State Board of Pharmacy proposes new §281.23, concerning Subpoenas, and amendments to §281.31, concerning Burden of Proof. The proposed new §281.23, if adopted, outlines the guidelines for issuing and requesting subpoenas. The proposed amendments to §281.31, if adopted, clarify that the applicant, licensee, or registrant has the burden of proof with regard to mental or physical evaluations.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure subpoenas are issued and requested correctly and clarify the burden of proof with regard to mental or physical evaluations. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed new rule and amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

The new rule and amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the new rule and amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.23. Subpoenas.

(a) A subpoena issued by the executive director/secretary under the authority of §565.058 of the Act is considered by the board to be a ministerial act. Such subpoena shall be used to obtain information and testimony at the request of board staff.

(b) If a subpoena is requested by an applicant, licensee, or registrant under §2001.089 of the APA, a showing of good cause shall be made to the executive director/secretary. Such a showing shall be by submission of a written request for the subpoena indicating the purpose of the subpoena and indicating that the subpoena is not requested in bad faith. In addition, the requesting party shall aver that the subpoena:

- (1) does not request information that is privileged;
- (2) requests information relevant to the contested case;
- (2) is not an undue burden; and
- (3) is sufficiently specific.

(c) Once the requesting party has complied with the requirements in subsection (b) of this section, the executive director/secretary may issue the subpoena.

(d) If the requesting party, the subpoenaed party, any other party to the contested case, or any person or entity affected by the subpoena objects, a challenge to the subpoena shall be filed with the Administrative Law Judge at the State Office of Administrative Hearings.

§281.31. *Burden of Proof.*

(a) In a contested case hearing at the State Office of Administrative Hearings involving grounds for disciplinary action, the board has the burden to prove that grounds to discipline respondent exist. However, the party that claims any exemption or exception, including mitigating factors as specified in [under] §281.62 of this chapter, has the burden to prove that the exemption or exception should be applied.

(b) (No change.)

(c) In a show cause hearing at the State Office of Administrative Hearings involving an applicant, licensee, or registrant who has been previously ordered by the board to submit to a mental or physical examination under §565.052 or §568.0036 of the Act, the applicant, licensee, or registrant has the burden to prove that the applicant, licensee, or registrant should not be required to submit to the examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 20, 2010.

TRD-201005433

Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 305-8028



SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §§281.60, 281.63, 281.64

The Texas State Board of Pharmacy proposes amendments to §281.60, concerning General Guidance; §281.63, concerning Considerations for Criminal Offenses; and §281.64, concerning Sanctions for Criminal Offenses. The proposed amendments, if adopted, clarify disciplinary guidelines for use in informal conferences and proceedings before the State Office of Administrative Hearings.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure appropriate disciplinary guidelines are in place for use at informal conferences and proceedings before the State Office of Administrative Hearings in order to adequately protect the public. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569,

Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.60. *General Guidance.*

(a) - (b) (No change.)

(c) Purpose of guidelines. These guidelines are designed to provide guidance in assessing sanctions for violations of the Act. The ultimate purpose of disciplinary sanctions is to protect and inform the public, deter future violations, offer opportunities for rehabilitation, if appropriate, punish violators, and deter others from violations. These guidelines are intended to promote consistent sanctions for similar violations, facilitate timely resolution of cases, and encourage settlements.

(1) The standard sanctions outlined in the subchapter apply to cases involving a single violation of the Act, and in which there are no aggravating ~~[or mitigating]~~ factors that apply. The board may impose more restrictive sanctions when there are multiple violations of the Act. In cases which do not have standard sanctions outlined in the subchapter, the board may consider [The board may impose more or less severe or restrictive sanctions, based on] any aggravating and/or mitigating factors listed in §281.62 of this title ~~[section 281.62]~~ (relating to Aggravating and Mitigating Factors) that are found to apply in a particular case.

(2) The standard and minimum sanctions outlined in the subchapter are applicable to first time violators. The board shall consider revoking the person's license if the person is a repeat offender.

(3) The maximum sanction in all cases is revocation of the licensee's license, which may be accompanied by an administrative penalty of up to \$5,000 per violation. Each day the violation continues is a separate violation.

(4) Each statutory violation constitutes a separate offense, even if arising out of a single act.

§281.63. *Considerations for Criminal Offenses.*

(a) - (f) (No change.)

(g) The board has the authority to impose disciplinary action as authorized by the Act, for those criminal offenses that provide grounds for discipline under the Act. In reaching a decision regarding the severity of the disciplinary sanction to impose on a license or registration, the board shall, in its discretion and unless otherwise specified in §281.64 of this title (relating to Sanctions for Criminal Offenses), also determine the person's fitness to perform the duties and discharge the responsibilities of a licensee or registrant by evaluating and balancing these factors in the following priority with the first being the highest priority:

(1) the extent and nature of the person's past criminal activity;

(2) the amount of time that has elapsed since the person's last criminal activity;

(3) the person's rehabilitation or rehabilitative effort while incarcerated or following release as corroborated by extrinsic evidence;

(4) the age of the person at the time of the commission of the crime, if younger than 21 years of age at the time of the crime;

(5) the conduct and work activity of the person prior to and following the criminal activity; and

(6) other evidence of the person's present fitness, including letters of recommendation from:

(A) prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(B) the sheriff and chief of police in the community where the person resides; and

(C) any other persons in contact with the [convicted] person.

(h) - (i) (No change.)

§281.64. Sanctions for Criminal Offenses.

(a) - (b) (No change.)

(c) The board has determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) of this title (relating to Considerations for Criminal Offenses) and necessitate the disciplinary action listed in paragraphs (1) - (3) of this subsection. In regard to the crimes enumerated in this rule, the board has weighed the factors, which are required to be considered from §281.63(g), in a light most favorable to the individual, and even if these factors were present, the board has concluded that the [The] following sanctions apply to individuals with the criminal offenses as described in paragraphs (1) - (3) of this subsection:

(1) - (3) (No change.)

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



CHAPTER 291. PHARMACIES

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.32, §291.33

The Texas State Board of Pharmacy proposes amendments to §291.32, concerning Personnel, and §291.33, concerning Operational Standards. The proposed amendments to §291.32, if adopted, clarify the requirements for pharmacists conducting electronic verification of prescriptions from a site other than the pharmacy and allow the pharmacist to not have a Texas pharmacist license if the pharmacist is employed by a Class E (Non-resident) pharmacy. The proposed amendments to §291.33, if adopted, removes references to dates no longer needed, corrects a reference to supportive personnel to pharmacy technicians and pharmacy technician trainees, and deletes the language regarding generic substitution since this rule is also found in Chapter 309.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that pharmacists conducting electronic verification of prescriptions are adequately licensed and update the rules to be consistent in references. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.32 Personnel.

(a) - (b) (No change.)

(c) Pharmacists.

(1) General.

(A) - (C) (No change.)

(D) Pharmacists shall directly supervise pharmacy technicians and pharmacy technician trainees who are entering prescription data into the pharmacy's data processing system by one of the following methods.

(i) Physically present supervision. A pharmacist shall be physically present to directly supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system. Each prescription entered into the data processing system shall be verified at the time of data entry. If the pharmacist is not physically present due to a temporary absence as specified in §291.33(b)(3)(4) of this title (relating to Operational Standards), on return the pharmacist must:

(I) conduct a drug regimen review for the prescriptions data entered during this time period as specified in §291.33(c)(2) of this title; and

(II) verify that prescription data entered during this time period was entered accurately.

(ii) Electronic supervision. A pharmacist may electronically supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system provided the pharmacist:

(I) is on-site, in the pharmacy where the technician/trainee is located;

(II) has immediate access to any original document containing prescription information or other information related to the dispensing of the prescription. Such access may be through imag-

ing technology provided the pharmacist has the ability to review the original, hardcopy documents if needed for clarification; and

(III) verifies the accuracy of the data entered information prior to the release of the information to the system for storage and/or generation of the prescription label.

(iii) Electronic verification of data entry by pharmacy technicians or pharmacy technician trainees. A pharmacist may electronically verify the data entry of prescription information into a data processing system provided:

(I) a pharmacist is onsite in the pharmacy where the pharmacy technicians/trainees are located;

(II) the pharmacist electronically conducting the verification is either a:

(-a-) Texas licensed pharmacist; or

(-b-) pharmacist employed by a Class E pharmacy and has entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of the pharmacist;

~~the pharmacist electronically conducting the verification is a Texas licensed pharmacist;~~

(III) the pharmacy establishes controls to protect the privacy and security of confidential records; and

(IV) the pharmacy keeps permanent records of prescriptions electronically verified for a period of two years.

(E) - (F) (No change.)

(2) - (3) (No change.)

(d) - (e) (No change.)

§291.33. Operational Standards.

(a) (No change.)

(b) Environment.

(1) (No change.)

(2) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key, combination or other mechanical or electronic means to prohibit unauthorized access when a pharmacist is not on-site except as provided in subparagraphs (C) and (D) of this paragraph and paragraph (3) of this subsection. The following is applicable:

(i) If the prescription department is closed at any time when the rest of the facility is open, the prescription department must be physically or electronically secured. The security may be accomplished by means such as floor to ceiling walls; walls, partitions, or barriers at least 9 feet 6 inches high; electronically monitored motion detectors; pull down sliders; or other systems or technologies that will secure the pharmacy from unauthorized entrance when the pharmacy is closed. Pharmacies licensed prior to June 1, 2009, shall be exempt from this provision unless the pharmacy changes location. Change of location shall include the relocation of the pharmacy within the licensed address. A pharmacy licensed prior to June 1, 2009 that files a change of ownership but does not change location shall be exempt from the provisions.

(ii) ~~The [Effective, June 1, 2009, the] pharmacy's~~ key, combination, or other mechanical or electronic means of locking the pharmacy may not be duplicated without the authorization of the pharmacist-in-charge or owner.

(iii) At [Effective, June 1, 2009, at] a minimum, the pharmacy must have a basic alarm system with off-site monitoring and perimeter and motion sensors. The pharmacy may have additional security by video surveillance camera systems.

(C) Prior to authorizing individuals to enter the prescription department, the pharmacist-in-charge or owner may designate persons who may enter the prescription department to perform functions, other than dispensing functions or prescription processing, documented by the pharmacist-in-charge including access to the prescription department by other pharmacists, pharmacy personnel and other individuals. The pharmacy must maintain written documentation of authorized individuals other than individuals employed by the pharmacy who accessed the prescription department when a pharmacist is not on-site.

(D) Only persons designated either by name or by title including such titles as "relief" or "floater" pharmacist, in writing by the pharmacist-in-charge may unlock the prescription department except in emergency situations. An additional key to or instructions on accessing the prescription department may be maintained in a secure location outside the prescription department for use during an emergency or as designated by the pharmacist-in-charge for entry by another pharmacist.

(E) Written policies and procedures for the pharmacy's security shall be developed and implemented by the pharmacist-in-charge and/or the owner of the pharmacy. Such policies and procedures may include quarterly audits of controlled substances commonly abused or diverted; perpetual inventories for the comparison of the receipt, dispensing, and distribution of controlled substances; monthly reports from the pharmacy's wholesaler(s) of controlled substances purchased by the pharmacy; opening and closing procedures; product storage and placement; and central management oversight.

(3) (No change.)

(c) Prescription dispensing and delivery.

(1) - (2) (No change.)

(3) Generic Substitution. A pharmacist may dispense a generically equivalent drug product and shall comply with the provisions of §309.3 of this title (relating to Generic Substitution).

~~[(A) General requirements.]~~

~~[(i) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:]~~

~~[(I) the generic product costs the patient less than the prescribed drug product;]~~

~~[(II) the patient does not refuse the substitution; and]~~

~~[(III) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subparagraph (C) of this paragraph.]~~

~~[(ii) If the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written~~

authorization from the practitioner and notes such authorization on the original prescription drug order.}]

[(B) Prescription format for written prescription drug orders.}]

[(i) A written prescription drug order issued in Texas may:}]

[(I) be on a form containing a single signature line for the practitioner; and}]

[(II) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."}]

[(ii) A pharmacist may dispense a prescription that is not issued on the form specified in clause (i) of this subparagraph, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C)(i) of this paragraph.}]

[(iii) The prescription format specified in clause (i) of this subparagraph does not apply to the following types of prescription drug orders:}]

[(I) prescription drug orders issued by a practitioner in a state other than Texas;}]

[(II) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or}]

[(III) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.}]

[(iv) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.}]

[(C) Dispensing directive.}]

[(i) Written prescriptions.}]

[(I) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."}]

[(II) The dispensing directive shall:}]

[(a) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. §1181 et seq.) and its subsequent amendments; and}]

[(b) comply with federal and state law, including rules, with regard to formatting and security requirements.}]

[(III) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.}]

[(IV) A practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or

other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.}]

[(ii) Verbal Prescriptions.}]

[(I) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subparagraph (B)(i) of this paragraph, or any other format that clearly indicates the substitution instructions.}]

[(II) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.}]

[(III) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:}]

[(a) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and}]

[(b) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in clause (i) of this subparagraph within 30 days.}]

[(iii) Electronic prescription drug orders.}]

[(I) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" on the electronic prescription drug order.}]

[(II) If the practitioner or practitioner's agent does not clearly indicate on the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.}]

[(III) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in clause (i) of this subparagraph within 30 days.}]

[(iv) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.}]

[(I) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:}]

[(a) prescription drug orders issued by a practitioner in a state other than Texas;}]

[(b) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or}]

[(c) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.}]

[(II) A pharmacist may not substitute on prescription drug orders identified in subclause (I) of this clause unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:}]

~~{{(a) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or}}~~

~~{{(b) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.}}~~

~~{{(1) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.}}~~

~~{{(2) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.}}~~

~~{{(3) Such documentation shall be updated yearly.}}~~

~~{{(D) Refills.}}~~

~~{{(i) Original substitution instructions. All refills, including prescriptions issued prior to June 1, 2001, shall follow the original substitution instructions or dispensing directive, unless otherwise indicated by the practitioner or practitioner's agent.}}~~

~~{{(ii) Narrow therapeutic index drugs.}}~~

~~{{(f) The board, in consultation with the Texas Medical Board, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code.}}~~

~~{{(a) The board has specified in §309.7 of this title (relating to Dispensing Responsibilities) that for drugs listed in the publication, pharmacists shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.}}~~

~~{{(b) Practitioners may prohibit substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph.}}~~

~~{{(H) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.}}~~

(4) - (6) (No change.)

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information:

(i) - (xiv) (No change.)

(xv) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer [manufacture], the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label

attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xvi) (No change.)

(B) - (C) (No change.)

(D) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) - (iv) (No change.)

(v) the dispensing container bears a label that adequately:

(I) (No change.)

(II) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer's original container, specifies the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer [manufacture], the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) (No change.)

(d) - (f) (No change.)

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees [supportive personnel] under the direction and direct supervision of a pharmacist.

(2) - (4) (No change.)

(h) Customized patient medication packages.

(1) - (2) (No change.)

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) - (x) (No change.)

(xi) effective June 1, 2010, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer [manufacture], the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pak [med-pak] if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xii) - (xiii) (No change.)

(B) (No change.)

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) - (iv) (No change.)

(v) the dispensing container bears a label that adequately:

(I) (No change.)

(II) effective June 1, 2010, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer [manufacture], the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pak [med-pak] if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) (No change.)

(4) - (8) (No change.)

(i) Automated devices and systems.

(1) (No change.)

(2) Automated pharmacy dispensing systems. [This paragraph becomes effective September 1, 2000.]

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a written program for quality assurance of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated pharmacy dispensing system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(III) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) require prior to use, that a pharmacist checks, verifies, and documents that the automated pharmacy dispensing system has been accurately filled each time the system is stocked;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(VI) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board, each patient of the pharmacy, and other appropriate agencies whenever an automated pharmacy dispensing system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.72, §291.73

The Texas State Board of Pharmacy proposes amendments to §291.72 concerning Definitions and §291.73 concerning Personnel. The proposed amendments to §291.72 and §291.73, if adopted, clarify the requirements for pharmacies utilizing tech-check-tech and the clinical pharmacy program and require a pharmacist to be on-site at the pharmacy when the pharmacy is open.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that pharmacies allowing tech-check-tech are appropriately staffed. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.72. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) Clinical Pharmacy Program--An ongoing program in which pharmacists are on duty during the time the pharmacy is open for pharmacy services and pharmacists provide direct focused, medication-related care for the purpose of optimizing patients' medication therapy and achieving definite outcomes, which includes ~~one or more of~~ the following activities:

(A) prospective medication therapy consultation, selection, and adjustment;

(B) monitoring laboratory values and therapeutic drug monitoring;

(C) identifying and resolving medication-related problems; and

(D) disease state management.

(8) - (49) (No change.)

§291.73. Personnel.

(a) - (d) (No change.)

(e) Pharmacy technicians and pharmacy technician trainees.

(1) (No change.)

(2) Duties. Duties may include, but need not be limited to, the following functions under the supervision of and responsible to a pharmacist:

(A) - (B) (No change.)

(C) Facilities with an ongoing clinical pharmacy program. A Class C pharmacy with an ongoing clinical pharmacy program may allow a pharmacy technician to verify the accuracy of the duties specified in clause (ii) of this subparagraph when performed by another pharmacy technician, under the following conditions:

(i) The pharmacy technician:

(I) is a registered pharmacy technician and not a pharmacy technician trainee; and

(II) meets the training requirements specified in §297.6 of this title and the training requirements specified in paragraph (1) of this subsection.

(ii) If the requirements of clause (i) of this subparagraph are met, a pharmacy technician may verify the accuracy of the following duties performed by another pharmacy technician:

(I) filling medication carts;

(II) distributing routine orders for stock supplies to patient care areas; and

(III) accessing and restocking automated medication supply systems after proper training on the use of the automated medication supply system and demonstration of comprehensive knowledge of the written policies and procedures for its operation; and

(iii) The patient's orders have previously been reviewed and approved by a pharmacist.

(iv) A pharmacist is on duty in the facility at all times that the pharmacy is open for pharmacy services.

(D) (No change.)

(3) (No change.)

(f) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



CHAPTER 309. SUBSTITUTION OF DRUG PRODUCTS

The Texas State Board of Pharmacy proposes amendments to §309.3 concerning Generic Substitution and §309.4 concerning Patient Notification and the repeal of §309.5 concerning Labeling Requirements. The proposed amendments to §309.3 and §309.4, if adopted, clarify the requirements for generic substitution on electronic prescription drug orders, remove the lan-

guage regarding substitution of dosage form since is duplicative of language in §291.33 and eliminate date references since the dates are no longer needed. The proposed repeal of §309.5, if adopted, removes the labeling requirements from this chapter because the language is found in §291.33.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that electronic prescriptions provide information consistent with state and federal requirements with regard to generic substitution. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments and repeal may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., November 5, 2010.

22 TAC §309.3, §309.4

The amendments are proposed under §§551.002, 554.051, and 562.015 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to adopt rules to provide a dispensing directive to instruct pharmacists on the manner in which to dispense a drug according to the contents of a prescription.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§309.3. *Generic Substitution.*

(a) - (b) (No change.)

(c) Dispensing directive.

(1) - (3) (No change.)

(4) Electronic prescription drug orders.

(A) To prohibit substitution, the practitioner or practitioner's agent shall clearly indicate substitution instructions [note "brand necessary" or "brand medically necessary"] in the electronic prescription drug order.

(B) If the practitioner or practitioner's agent does not indicate or does not clearly indicate in the electronic prescription drug order that the brand is [medically] necessary, the pharmacist may substitute a generically equivalent drug product.

(C) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall comply with state and federal laws. [fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in paragraph (1) of this subsection within 30 days.]

(5) (No change.)

[(d) Substitution of dosage form.]

[(1) As specified in §562.012 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as tablets instead of capsules or liquid instead of tablets, provided:]

[(A) the patient consents to the dosage form substitution;]

[(B) the pharmacist notifies the practitioner of the dosage form substitution; and]

[(C) the dosage form so dispensed:]

[(i) contains the identical amount of the active ingredients as the dosage prescribed for the patient;]

[(ii) is not an enteric-coated or time release product; and]

[(iii) does not alter desired clinical outcomes;]

[(2) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.]

(d) [(e)] Refills.

(1) Original substitution instructions. All refills shall follow the original substitution instructions unless otherwise indicated by the practitioner or practitioner's agent.

(2) Narrow therapeutic index drugs.

(A) The board and the Texas Medical Board shall establish a joint committee to recommend to the board a list of narrow therapeutic index drugs and the rules, if any, by which this paragraph applies to those drugs. The committee must consist of an equal number of members from each board. The committee members shall select a member of the committee to serve as presiding officer for a one year term. The presiding officer may not represent the same board as the presiding officer's predecessor.

(B) The board, on the recommendation of the joint committee, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.014, Occupations Code.

(i) The board has specified in §309.7 of this title (relating to dispensing responsibilities) that for drugs listed in the publication, pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. For drugs listed in the publications, pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(ii) Practitioners may prohibit substitution through a dispensing directive in compliance with subsection (c) of this section.

(C) The board shall reconsider the contents of the list if:

(i) the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products; or

(ii) any interested person petitions the board to reconsider the list. If the board receives a petition to include a drug on the list, the joint committee specified in subparagraph (A) of this paragraph shall review the request and make a recommendation to the board.

§309.4. *Patient Notification.*

(a) - (b) (No change.)

(c) Notification by pharmacies delivering prescriptions by mail.

(1) A [By January 1, 2006, a] pharmacy that supplies a prescription by mail is considered to have complied with the provision of subsection (a) of this section if the pharmacy includes on the prescription order form completed by the patient or the patient's agent language that clearly and conspicuously:

(A) states that if a less expensive generically equivalent drug is available for the brand prescribed, the patient or the patient's agent may choose between the generically equivalent drug and the brand prescribed; and

(B) allows the patient or the patient's agent to indicate the choice of the generically equivalent drug or the brand prescribed.

(2) If the patient or patient's agent fails to indicate otherwise [other wise] to a pharmacy on the prescription order form under paragraph (1) of this subsection, the pharmacy may dispense a generically equivalent drug.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



22 TAC §309.5

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Pharmacy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under §§551.002, 554.051, and 562.015 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to adopt rules to provide a dispensing directive to instruct pharmacists on the manner in which to dispense a drug according to the contents of a prescription.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§309.5. *Labeling Requirements.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.

Executive Director/Secretary

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



PART 32. STATE BOARD OF EXAMINERS FOR SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY

CHAPTER 741. SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

The State Board of Examiners for Speech-Language Pathology and Audiology (board) proposes amendments to §§741.1, 741.11 - 741.15, 741.31 - 741.33, 741.41 - 741.45, 741.61 - 741.65, 741.81 - 741.85, 741.91, 741.101 - 741.103, 741.111, 741.112, 741.121, 741.122, 741.141, 741.161, 741.162, 741.164, 741.165, 741.181, 741.182 and 741.191 - 741.201, the repeal of §741.163, and new §§741.202 and 741.211 - 741.215 concerning the regulation and licensure of speech-language pathologists and audiologists.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 741.1, 741.11 - 741.15, 741.31 - 741.33, 741.41 - 741.45, 741.61 - 741.65, 741.81 - 741.85, 741.91, 741.101 - 741.103, 741.111, 741.112, 741.121, 741.122, 741.141, 741.161 - 741.165, 741.181, 741.182 and 741.191 - 741.201 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist because rules relating to the licensure and regulation of speech-language pathologists and audiologists are needed in order to protect and promote public health, safety, and welfare.

The proposal represents the result of a comprehensive rule review undertaken by the board and the board's staff. In general, each section was reviewed and proposed in accordance with ensuring clarity; current legal, policy, and operational considerations; accuracy; and improved draftsmanship.

The purpose of the rules is to establish procedures to evaluate, upon request, the criminal history of potential applicants to determine if they are ineligible to hold a license. These evaluations will occur before the potential applicants enter or complete a preparatory educational program or licensure examination leading to licensure thereby allowing applicants to avoid unnecessary hardship or costs if their criminal history is a ground for license ineligibility. These rules establish fees and procedures for the issuance of a criminal history evaluation letter.

The proposed rules are necessary to comply with amendments made to Occupations Code, Chapter 53 by House Bill (HB) 963, 81st Legislature, Regular Session (2009). HB 963 authorizes the collection of a fee for providing potential applicants a criminal history evaluation letter. All state agencies that issue licenses or certificates to engage in a particular occupation must adopt

rules necessary to administer the new provisions by September 1, 2010.

SECTION-BY-SECTION SUMMARY

The amendments to §741.1 reflect current operating procedures and to clarify the definition of telehealth.

Sections 741.11, 741.32, 741.43, 741.81 - 741.84, 741.101, 741.103, 741.111, 741.162, 741.164, 741.165, 741.191 - 741.195, and 741.197 - 741.201 specifically improve draftsmanship.

The amendments to §741.12 are proposed to delete unnecessary language and to improve draftsmanship.

The amendments to §§741.13, 741.14, 741.15, 741.31, 741.33, 741.41, 741.45, 741.61 - 741.65, 741.85, 741.91, 741.112, 741.121, 741.141, 741.161, 741.182, and 741.196 are proposed to reflect current operating procedures, while improving draftsmanship.

The amendment to §741.42 is proposed to delete unnecessary and obsolete language.

The amendments to §741.44 are to improve draftsmanship and to clarify professional titles used by assistants and interns.

The amendments to §741.102 are to improve draftsmanship and clarify what shall be on the written contract.

The amendment to §741.122 is proposed to clarify that licensees renewing a license must complete the jurisprudence examination for only one renewal period.

The repeal of existing §741.163 is proposed to reflect current operating procedures.

The amendment to §741.181 and new §741.202 contain uniform language outlining provisions for fees and procedures for the issuance of criminal history evaluation letters in the speech-language pathology and audiology programs. The criminal history evaluation letter fee is \$50 for each of the programs and the procedures are uniform among the program rules. The procedures require a person making a request for the issuance of a criminal history evaluation letter to complete and submit a request form and the applicable fee. The rules require the department to make the requested determination regarding the person's eligibility for a license and issue a criminal history evaluation letter not later than the 90th day after the date the department received the request.

The amendments to §741.1 and new §§741.211 - 741.215 are proposed to outline the definitions, service delivery mode, guidelines and limitations of telehealth services delivered by licensed speech-language pathologists and/or audiologists.

FISCAL NOTE

Joyce Parsons, Executive Director, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS ECONOMIC STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Ms. Parsons has also determined that there will be no adverse effect on small businesses or micro-businesses as those businesses are not required to comply with the sections as proposed. Small businesses and micro-businesses will not be required to alter their business practices, since the request for a criminal

history evaluation letter under the proposed rules applies only to individuals and is optional. There are anticipated economic costs to persons who choose to comply with the sections as proposed and the cost is \$50 for a person who requests a criminal history evaluation letter. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Parsons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to ensure the effective regulation of speech-language pathologists and audiologists in Texas, which will protect and promote public health, safety, and welfare.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Joyce Parsons, Executive Director, State Board of Examiners for Speech-Language Pathology and Audiology, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347. Comments may also be sent through email to speech@dshs.state.tx.us. Please write "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

SUBCHAPTER A. DEFINITIONS

22 TAC §741.1

STATUTORY AUTHORITY

The amendment is authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.1. Definitions.

Unless the context clearly indicates otherwise, the words and terms below shall have the following meanings. Refer to Texas Occupations Code, §401.001, for definitions of additional words and terms.

(1) ABA--The American Board of Audiology.

(2) [(+)] Act--Texas Occupations Code, Chapter 401, relating to speech-language pathologists and audiologists.

(3) ASHA--The American Speech-Language-Hearing Association.

(4) ~~[(2)]~~ Assistant License in Speech-Language Pathology--An individual who provides speech language pathology support services ~~[to clinical programs]~~ under supervision of a licensed speech-language pathologist.

(5) ~~[(3)]~~ Assistant License in Audiology--An individual who provides audiological support to clinical programs under supervision of a licensed audiologist.

~~[(4)]~~ Delegation--The supervisor of an assistant may delegate certain services to the assistant; however, the supervisor is ultimately responsible for all services provided.]

(6) ~~[(5)]~~ Ear specialist--A licensed physician who specializes in diseases of the ear and is medically trained to identify the symptoms of deafness in the context of the total health of the client, and is qualified by special training to diagnose and treat hearing loss. Such physicians are also known as otolaryngologists, otologists, neurotologists, otorhinolaryngologists, and ear, nose, and throat specialists.

(7) ~~[(6)]~~ Extended absence--More than two consecutive working days for any single continuing education experience.

(8) ~~[(7)]~~ Extended recheck--Starting at 40 dB and going down by 10 dB until no response is obtained or until 20 dB is reached and then up by 5 dB until a response is obtained. The frequencies to be evaluated are 1,000, 2,000, and 4,000 hertz (Hz).

(9) ~~[(8)]~~ Fitting and dispensing hearing instruments--The measurement of human hearing using professionally accepted practices to select, adapt, or sell a hearing instrument.

(10) ~~[(9)]~~ Health care professional--An individual required to be licensed under Texas Occupations Code, Chapter 401, or any person licensed, certified, or registered by the state in a health-related profession.

(11) ~~[(10)]~~ Hearing instrument--A device designed for, offered for the purpose of, or represented as aiding persons with or compensating for, impaired hearing.

(12) ~~[(11)]~~ Hearing screening--A test administered with pass/fail results for the purpose of rapidly identifying those persons with possible hearing impairment which has the potential of interfering with communication.

(13) ~~[(12)]~~ Sale or purchase--Includes the sale, lease or rental of a hearing instrument or augmentative communication device to a member of the consuming public who is a user or prospective user of a hearing instrument or augmentative communication device.

(14) Telehealth--The use of telecommunications and information technologies for the exchange of information from one site to another for the provision of speech-language pathology or audiology services to an individual from a provider through hardware or internet connection.

(15) Telepractice--The practice of telehealth.

(16) ~~[(13)]~~ Under the direction of--The licensed speech-language pathologist or audiologist directly oversees the services provided and accepts professional responsibility for the actions of the personnel he or she agrees to direct.

~~[(14)]~~ Used hearing instrument--A hearing instrument that has been worn for any period of time by a user. However, a hearing instrument shall not be considered "used" merely because it has been worn by a prospective user as a part of a bona fide hearing instrument evaluation conducted to determine whether to select that par-

ticular hearing instrument for that prospective user, if such evaluation has been conducted in the presence of the dispenser or a hearing instrument health professional selected by the dispenser to assist the buyer in making such a determination.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005402

Kerry Ormson

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER B. THE BOARD

22 TAC §§741.11 - 741.15

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.11. Officers.

(a) The presiding officer shall preside at all meetings at which he or she is in attendance, perform all duties prescribed by law, the Act or this chapter, and is authorized by the board to make day-to-day minor decisions regarding board activities in order to facilitate the responsiveness and effectiveness of the board.

(b) (No change.)

(c) The secretary-treasurer shall ~~[will]~~ sign the approved minutes of the board and other approved documents of the board in the absence of the presiding officer and assistant presiding officer.

§741.12. Committees.

(a) The presiding officer may appoint board members to committees to assist the board in its work. All committees shall consist of no more than four members and shall make regular reports to the board by interim written reports or at regular meetings. Standing committees shall may include:

(1) - (3) (No change.)

(4) audiology scope of practice; and

(5) legislative review. ~~[complaints; and]~~

~~[(6)]~~ legislative review.

(b) Board members may also be appointed to individually assist the board office with specific issues. The board member shall report any decisions made to the full board at the next scheduled meeting for ratification. Items that shall ~~[may]~~ be discussed include:

(1) - (8) (No change.)

(c) Members appointed to the complaints committee shall consist of one audiologist, one speech-language pathologist, ~~[and] one public member, and other members as appointed by the board chair.~~ The committee chair shall ~~[may]~~ call a meeting whenever necessary.

§741.13. Transaction of Official Business.

~~[(a) The board shall annually review the costs and revenue associated with the licensing program.]~~

(a) ~~[(b)]~~ The board shall elect, by a simple majority vote of those members present, a presiding officer, an assistant presiding officer, and a secretary-treasurer at the meeting held nearest to January 1st. If a vacancy occurs in any of the offices at any other time, it shall be filled by a simple majority vote of those members present at any board meeting.

(b) ~~[(e)]~~ The executive director shall prepare and submit an agenda to the board prior to each meeting. The agenda shall include:

- (1) items required by law;
- (2) items requested by members; and
- (3) other items of board business approved for discussion by the presiding officer.

(c) ~~[(d)]~~ The board shall make all official decisions according to parliamentary procedure as set forth in Robert's Rules of Order Revised. If a question arises concerning interpretation of Robert's Rules of Order Revised, the presiding officer or assistant presiding officer shall make the decision.

(d) ~~[(e)]~~ The board shall not be bound in any way by any statement or action on the part of any board member, committee, or staff member except when a statement or action is in pursuance of the specific instruction of the board.

§741.14. Petition for Adoption of a Rule.

(a) A person shall ~~[may]~~ submit a written petition to the board requesting adoption of a rule. The petition shall contain the following:

(1) - (5) (No change.)

(b) - (f) (No change.)

(g) All initial petitions for the adoption of a rule shall be presented to and decided by the board in accordance with the provisions of this section. ~~[The board may refuse to consider any subsequent petition for the adoption of the same or similar rule submitted within six months after the date of the initial petition.]~~

§741.15. Impartiality and Nondiscrimination.

(a) Any board member who is unable to be impartial in the determination of an applicant's eligibility for licensure or in a disciplinary action against a licensee shall so declare this to the board and shall not participate in any board proceedings involving that applicant or licensee.

(b) The board shall make no decision in the discharge of its statutory authority with regard to any person's race, religion, color, gender, national origin, age, disability, sexual orientation, genetic information, or family health history.

(c) Applicant with disabilities.

(1) The board shall comply with the Americans with Disabilities Act.

(2) Applicants with disabilities shall inform the board 30 days in advance of any special accommodations needed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER C. SCREENING PROCEDURES

22 TAC §§741.31 - 741.33

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.31. Communication Screening.

(a) (No change.)

(b) Communication screening should include cursory assessments of language and speech to determine if further testing is indicated ~~[a delay or a disorder exists]~~. Formal instruments and informal observations may be used for the assessment. If the screening is not passed, a detailed evaluation is indicated.

(1) - (2) (No change.)

(c) (No change.)

§741.32. Hearing Screening.

(a) (No change.)

(b) Hearing screening shall be performed and interpreted as follows.

(1) - (2) (No change.)

(3) Screening failures shall ~~[will]~~ be followed with a second pure-tone air conduction screening utilizing the same protocol within four weeks.

(c) (No change.)

§741.33. Newborn Hearing Screening.

(a) Individuals licensed under the Act may participate in universal newborn hearing screening as defined by the Texas Health and Safety Code, Chapter 47.

(b) Individuals licensed under this Act are subject to 25 Texas Administrative Code, Chapter 37, regarding reporting data to the Department of State Health Services (DSHS) and 40 Texas Administrative Code, §108.9, regarding referral of children under the age of three years to Early Childhood Intervention (ECI).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER D. CODE OF ETHICS; DUTIES AND RESPONSIBILITIES OF LICENSE HOLDERS

22 TAC §§741.41 - 741.45

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.41. Professional Responsibilities of License Holders.

(a) A licensee shall:

(1) - (8) (No change.)

(9) provide accurate information to clients and the public about the nature and management of communication ~~[communicative]~~ disorders and about the profession and the services rendered;

(10) notify the board in writing of changes of name, highest academic degree granted, address, and telephone number. The board is not responsible for lost, misdirected, or undelivered mail; ~~[and]~~

(11) notify the board of changes in name or preferred mailing address within 30 days of such change(s). Notification ~~[which]~~ must include the name, mailing address, and zip code, and be mailed, telephoned, faxed, or sent by electronic mail to the executive director; ~~[-]~~

(12) inform the board of violations of the Act, this code of ethics, or of any other provision of this chapter;

(13) comply with any order relating to the licensee which is issued by the board;

(14) report in accordance with the Family Code, §261.101(b), if there is cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person;

(15) cooperate with the board by promptly furnishing required documents and by promptly responding to a request for information from, or a subpoena issued by, the board or the board's designee;

(16) be subject to disciplinary action by the board if the licensee or registrant is issued a written reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Texas Code of Criminal Procedure, Article 56.31 (relating to the Crime Victims Compensation Act);

(17) comply with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of HIV or Hepatitis B virus by infected health care workers; and

(18) fully inform clients of the:

(A) results of an evaluation within 60 days, upon request;

(B) nature and possible effects of the services rendered; and

(C) nature, possible effects, and consequences of activities if the client is participating in research or teaching activities.

(b) A licensee shall not:

(1) - (8) (No change.)

~~[(9) evaluate or treat speech, language, or hearing disorders solely by written, telephone, or electronic/video correspondence or communication;]~~

(9) ~~[(10)]~~ reveal, without authorization, any professional or personal information about the person served professionally, unless required by law to do so, or unless doing so is necessary to protect the welfare of the person or of the community;

(10) ~~[(11)]~~ participate in activities that constitute a conflict of professional interest which may include the following:

(A) exclusive recommendation of a product that the licensee owns or has produced;

(B) lack of accuracy in the performance description of a product a licensee or registrant has developed; or

(C) restriction of freedom of choice for sources of services or products;

(11) ~~[(12)]~~ use his or her professional relationship with a client, intern, assistant, or student to promote for personal gain or profit any item, procedure, or service unless the licensee or registrant has disclosed to the client, intern, assistant, or student the nature of the licensee's or registrant's personal gain or profit;

(12) ~~[(13)]~~ misrepresent his or her training or competence; ~~[or]~~

(13) ~~[(14)]~~ falsify records; ~~[-]~~

(14) aid or abet the practice of an unlicensed person when that person is required to have a license under the Act;

(15) interfere with a board investigation or disciplinary proceeding by willful misrepresentation or omission of facts to the board or the board's designee or by the use of threats or harassment against any person; or

(16) intentionally or knowingly offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting clients or patronage for or from any health care professional. The provisions of the Texas Health and Safety Code, §161.091, concerning the prohibition of illegal remuneration apply to licensees.

~~[(e) A licensee shall fully inform clients of the:]~~

~~{(1) results of an evaluation within 60 days, upon request;}~~
~~{(2) nature and possible effects of the services rendered;~~
~~and}~~

~~{(3) nature, possible effects, and consequences of activities if the client is participating in research or teaching activities.}~~

~~{(d) A licensee shall inform the board of violations of this code of ethics or of any other provision of this chapter.}~~

~~{(e) A licensee shall comply with any order relating to the licensee which is issued by the board.}~~

~~{(f) A licensee shall not aid or abet the practice of an unlicensed person when that person is required to have a license under the Act.}~~

~~{(g) A licensee shall report in accordance with the Family Code, §261.101(b), if there is cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person.}~~

~~{(h) A licensee shall not interfere with a board investigation or disciplinary proceeding by willful misrepresentation or omission of facts to the board or the board's designee or by the use of threats or harassment against any person.}~~

~~{(i) A licensee shall cooperate with the board by promptly furnishing required documents and by promptly responding to a request for information from or a subpoena issued by the board or the board's designee.}~~

~~{(j) A licensee shall not intentionally or knowingly offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting clients or patronage for or from any health care professional. The provisions of the Health and Safety Code, §161.091, concerning the prohibition of illegal remuneration apply to licensees.}~~

~~{(k) A licensee who provides direct client care shall comply with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of HIV or Hepatitis B virus by infected health care workers.}~~

~~{(l) A licensee shall be subject to disciplinary action by the board if the licensee or registrant is issued a written reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Texas Code of Criminal Procedure, Article 56.31, relating to the Crime Victims Compensation Act.}~~

§741.42. Advertising.

A licensee shall not present false, misleading, deceptive, or non-verifiable ~~[not readily verifiable]~~ information relating to the services of the licensee or any person supervised or employed by the licensee which includes, but is not limited to:

(1) - (2) (No change.)

~~{(3) presenting false, misleading, or deceptive information in connection with an application by the licensee for a license issued under the Act, or for employment to provide speech-language pathology or audiology services;}~~

(3) ~~[(4)]~~ presenting false, misleading, or deceptive information relating to the following:

- (A) any advertisement, announcement, or presentation;
- (B) any announcement of services;

- (C) letterhead or business cards;
- (D) commercial products;
- (E) billing statements or charges for services;
- (F) facsimile broadcast; or
- (G) website;

(4) ~~[(5)]~~ presenting false, misleading, or deceptive advertising that is not readily subject to verification including any manner of communication referenced in paragraph (3) ~~[(4)]~~ of this section and advertising that:

(A) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(B) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(C) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(D) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(E) advertises or represents that health care insurance deductibles or co-payments may be waived or are not applicable to health care services to be provided if the deductibles or co-payments are required;

(F) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or co-payments are required;

(G) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of client; and

(H) advertises or uses a professional name, a title, or professional identification that is expressly or commonly reserved for or used by another profession or professional.

§741.43. Recordkeeping and Billing.

(a) - (e) (No change.)

(f) A licensee shall provide, in clear ~~[plain]~~ language, a written explanation of the charges for speech-language pathology and/or audiology services previously made on a bill or statement for the client upon the written request of a client, a client's guardian, or a client's parent, if the client is a minor.

(g) - (h) (No change.)

§741.44. Requirements, Duties, and Responsibilities of Supervisors.

(a) A licensee must have three years of professional experience in providing direct client services in the area of licensure in order to supervise an intern or assistant. The licensee's internship year shall ~~[practice when completing the internship may]~~ be counted toward the three years of experience. If the licensed speech-language pathologist does not have the required experience, he or she may submit a written request outlining his or her qualifications and the reason for the request. The board's designee shall evaluate the request and approve or disapprove it within 15 working days of receipt by the board.

(b) - (e) (No change.)

(f) A licensed assistant shall not use "SLP-A" or "STA" as indicators for their credentials. Licensees shall use "Assistant SLP" or "SLP Assistant" to shorten their professional title.

(g) A licensed intern shall not use "SLP-CFY" or "SLP-CF" as indicators for their credentials. Licensees shall use "Intern SLP" or "SLP Intern" to shorten their professional title.

§741.45. Consumer Information and Display of License.

(a) A licensee shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the board for the purpose of directing complaints to the board. A licensee shall display ~~by providing~~ notification on a sign prominently displayed in the primary place of business of each licensee; and on a written document such as a written contract, a bill for service, or office information brochure provided by the [a] licensee to a client or third party.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER E. REQUIREMENTS FOR LICENSURE OF SPEECH-LANGUAGE PATHOLOGISTS

22 TAC §§741.61 - 741.65

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.61. Requirements for a Speech-Language Pathology License.

(a) - (b) (No change.)

(c) An applicant shall complete at least 25 clock hours of supervised observation before completing the minimum of the following hours of supervised clinical direct client contact ~~[experience]~~, which may be referred to as clinical practicum, with individuals who present a variety of communication disorders within an educational institution or in one of its cooperating programs:

(1) - (3) (No change.)

(d) - (g) (No change.)

§741.62. Requirements for an Intern in Speech-Language Pathology License.

(a) (No change.)

(b) In the event the course work and clinical experience set out in subsection (a) of this section were earned more than 10 years

before the date of application for the intern license, the applicant shall submit proof of current knowledge of the practice of speech-language pathology. Within 15 working days of receipt of the request, the board's designee shall evaluate the documentation and shall approve the application, request additional documentation, or require that additional course work ~~[coursework]~~ or continuing professional education be earned. If necessary, the applicant may reapply for the license when the requirements of this section are met.

(c) - (e) (No change.)

(f) An applicant whose master's degree is received at a college or university accredited by the American Speech-Language-Hearing Association Council on Academic Accreditation will receive automatic approval of the course work and clinical experience if the program director or designee verifies that all requirements as outlined in §741.61(a) - (c) of this title have been met and review of the transcript shows that the applicant has successfully completed at least 24 semester credit hours acceptable toward a graduate degree in the area of speech-language pathology ~~[with six hours in audiology]~~.

(g) (No change.)

(h) The internship shall:

(1) begin within four years after the academic and clinical experience requirements as required by subsection (a) of this section have been met;

(2) be completed within a maximum period of 48 ~~[36]~~ months once initiated;

(3) - (5) (No change.)

(6) be divided into three segments with no fewer than 36 clock hours of supervisory activities to include:

(A) six hours of in person ~~[face-to-face]~~ observations per segment by the board approved supervisor(s) of the intern's direct client contact at the worksite in which the intern provides screening, evaluation, assessment, habilitation, and rehabilitation; and

(B) (No change.)

(C) an alternative plan as approved by the board's ~~[Board's]~~ designee.

(i) (No change.)

(j) An intern who is employed full-time as defined by subsection (h)(3) of this section and wishes to practice at an additional site, shall submit the Intern Plan and Agreement of Supervision Form ~~[form]~~ for that site.

(k) (No change.)

(l) Prior to implementing changes in the internship, approval from the board office is required.

(1) If the intern changes his or her supervisor or adds additional supervisors, a current Intern Plan and Agreement of Supervision Form ~~[Intern plan and agreement of supervision form]~~ shall be submitted by the new proposed supervisor and approved by the board before the intern may resume practice. The Report of Completed Internship Form ~~[A report of completed internship form]~~ shall be completed by the past supervisor and intern and submitted to the board office upon completion of that portion of the internship. It is the decision of the supervisor to determine whether the internship is acceptable. The board office shall evaluate the form and inform the intern of the results.

(2) Each supervisor who ceases supervising an intern shall submit a Report of Completed Internship Form ~~[report of completed internship form]~~ for the portion of the internship completed under the

supervisor's supervision. This must be submitted within 30 days of the date the supervision ended.

(3) - (4) (No change.)

(m) - (o) (No change.)

§741.63. Waiver of Clinical and Examination Requirements for Speech-Language Pathologists.

An applicant for a license issued by this board who currently holds the ASHA Certificate of Clinical Competence (CCC) may submit official documentation from ASHA of the CCC as evidence that the applicant meets the clinical experience and examination requirements as set out in the Act, and §741.61 of this title (relating to Requirements for a Speech-Language Pathology License).

§741.64. Requirements for an Assistant in Speech-Language Pathology License.

(a) (No change.)

(b) The baccalaureate degree shall be completed at a college or university which has a program accredited by the American Speech-Language-Hearing Association Council on Academic Accreditation or holds accreditation or candidacy status from a recognized regional accrediting agency.

(1) (No change.)

(2) In the event the course work and clinical experience set out in subsection (a) of this section were earned more than 10 years before the date of application for the assistant license, the applicant shall submit proof of current knowledge of the practice of speech-language pathology to be evaluated by the board's designee. Within 15 working days of receipt, the board's designee shall evaluate the documentation and shall either approve the application, request additional documentation, or require that additional course work [~~coursework~~] or continuing professional education be earned. If necessary, the applicant may reapply for the license when the requirements of this section are met.

(c) An applicant who possesses a baccalaureate degree with a major that is not in communicative sciences and disorders may qualify for the assistant license. The board's designee shall evaluate transcripts on a case-by-case basis to ensure equivalent academic preparation, and shall determine if the applicant satisfactorily completed 24 semester credit hours in communicative sciences or disorders, which may include some leveling hours. Within 15 working days of receipt, the board's designee shall approve the application, request additional documentation, or require that additional course work [~~coursework~~] or continuing professional education be earned. If necessary, the applicant may reapply for the license when the requirements of this section are met.

(d) (No change.)

(e) An applicant who has not acquired the 25 hours of clinical observation and 25 hours of clinical experience referenced in subsection (a)(3) of this section shall not meet the minimum qualifications for the assistant license. These hours must be obtained through an accredited college or university, or through a Clinical Deficiency Plan. In order to acquire these hours, the applicant shall first obtain the assistant license by submitting the forms, fees, and documentation referenced in §741.112(d) of this title (relating to Required Application Materials) and include the prescribed Clinical Deficiency Plan to acquire the clinical observation and clinical assisting experience hours lacking.

(1) The licensed speech-language pathologist who will provide the applicant [~~licensed assistant~~] with the training to acquire these hours shall submit:

(A) - (B) (No change.)

(2) - (3) (No change.)

(4) Immediately upon completion of the Clinical Deficiency Plan, the licensed speech-language pathologist identified in the plan shall submit:

(A) - (B) (No change.)

(C) a signed statement that the licensed assistant successfully completed the clinical observation and clinical assisting experience under his or her 100% direct, in person [~~face-to-face~~] supervision. This statement shall specify the number of hours completed and verify completion of the training identified in the Clinical Deficiency Plan.

(5) (No change.)

(6) A licensed assistant may continue to practice under 100% in person [~~face-to-face~~] supervision of the licensed speech-language pathologist who provided the licensed assistant with the training while the board office evaluates the documentation identified in paragraph (4) of this subsection.

(7) (No change.)

(f) (No change.)

(g) A licensed speech-language pathology supervisor shall assign duties and provide appropriate supervision to the licensed assistant.

(1) - (3) (No change.)

(4) The supervising speech-language pathologist shall provide a minimum of two hours per week of supervision, at least one hour of which is in person [~~face-to-face~~] supervision where the licensed assistant is providing the therapy. This applies whether the licensed assistant's practice is full or part-time.

(5) - (7) (No change.)

(h) - (j) (No change.)

(k) A licensed assistant may represent special education and speech pathology at the ARD meetings with the following stipulations.

(1) - (3) (No change.)

(4) The licensed assistant shall present IEP goals and objectives that have been developed by the supervising speech-language pathologist and reviewed with the parent by the supervising speech-language pathologist.

(5) (No change.)

(l) - (m) (No change.)

§741.65. Requirements for a Temporary Certificate of Registration in Speech-Language Pathology.

(a) (No change.)

(b) If issued, this certificate entitles an applicant approved for examination as required by §741.121 of this title (relating to Examination Administration) to practice speech-language pathology under supervision of an approved speech-language pathologist for a period of time ending eight weeks after the next scheduled examination. During each eight week time period, no less than four hours of direct in person observation and four hours of indirect supervising activities shall be completed.

(c) A temporary certificate of registration shall not be renewed [~~is not renewable~~].

(d) The supervisor and applicant shall complete the Temporary Supervisory Form and submit it to the board office. The applicant shall not practice until the application is approved by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER F. REQUIREMENTS FOR LICENSURE OF AUDIOLOGISTS

22 TAC §§741.81 - 741.85

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.81. *Requirements for an Audiology License.*

(a) - (d) (No change.)

(e) In the event the applicant passed the examination referenced in subsection (d) of this section more than two years after the completion date of the internship, the applicant shall repeat the 36 weeks supervised internship before applying for the audiology license. The applicant shall obtain the intern license as required by §741.82 of this title (relating to Requirements for an Intern in Audiology License) prior to repeating the internship. The applicant may appeal to the board ~~[board's designee]~~ for waiver of the requirement to repeat the internship.

(f) (No change.)

§741.82. *Requirements for an Intern in Audiology License.*

(a) - (e) (No change.)

(f) The internship shall:

(1) consist of 1,600 hours of supervised clinical work as defined in paragraph (2) of this subsection. The internship shall begin after completion of all academic course work ~~[coursework]~~; and

(2) (No change.)

(g) - (h) (No change.)

§741.83. *Waiver of Clinical and Examination Requirements for Audiologists.*

An applicant who currently holds either the ASHA Certificate of Clinical Competence (CCC) or the American Board of Audiology (ABA)

certification may submit official documentation from ASHA or ABA as evidence that the applicant meets the clinical experience and examination requirements as referenced in §741.81 of this title (relating to Requirements for an Audiology License).

§741.84. *Requirements for an Assistant in Audiology License.*

(a) - (b) (No change.)

(c) The baccalaureate degree shall be completed at a college or university that ~~[has a program accredited by the American Speech-Language-Hearing Association Council on Academic Accreditation or]~~ holds accreditation or candidacy status from a recognized regional accrediting agency.

(1) - (2) (No change.)

(d) - (e) (No change.)

(f) An applicant who has not acquired the hours referenced in subsection (b)(3) of this section shall not meet the minimum qualifications for the assistant license. Other than acquiring the 25 hours of clinical observation and the 25 hours of clinical assisting experience through an accredited college or university, there are no other exemptions in the Act for an applicant to acquire the hours. The applicant shall first obtain the assistant license by submitting the forms, fees, and documentation referenced in §741.112(e) of this title (relating to Required Application Materials) and include a clinical deficiency plan to acquire the clinical observation and clinical assisting experience hours lacking.

(1) The licensed audiologist who will provide the assistant with the training to acquire these hours shall submit:

(A) (No change.)

(B) a clinical deficiency plan that shall include the following:

(i) - (iii) (No change.)

(iv) statement that the training shall be conducted under 100% direct, in person ~~[face-to-face]~~ supervision of the assistant; and

(v) (No change.)

(2) - (3) (No change.)

(4) Immediately upon completion of the clinical deficiency plan, the licensed audiologist who is providing the licensed assistant with the training identified in the plan shall submit:

(A) - (B) (No change.)

(C) a signed statement that the assistant successfully completed the clinical observation and clinical assisting experience under his or her 100% direct, in person ~~[face-to-face]~~ supervision of the assistant. This statement shall specify the number of hours completed and verify completions of the training identified in the clinical deficiency plan.

(5) - (8) (No change.)

(g) (No change.)

(h) A licensed audiologist shall assign duties and provide appropriate supervision to the assistant.

(1) - (2) (No change.)

(3) The supervising audiologist(s) shall provide the minimum of two hours per week, at least one hour of which is in person ~~[face-to-face]~~ supervision, at the location where the assistant is employed. This applies whether the assistant's practice is full or part-time.

(4) - (7) (No change.)

(i) - (l) (No change.)

§741.85. Requirements for a Temporary Certificate of Registration in Audiology.

(a) - (b) (No change.)

(c) A temporary certificate of registration may not be renewed [is not renewable].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson

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SUBCHAPTER G. REQUIREMENTS FOR DUAL LICENSURE AS A SPEECH-LANGUAGE PATHOLOGIST AND AN AUDIOLOGIST

22 TAC §741.91

STATUTORY AUTHORITY

The amendment is authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.91. Requirements for Dual Licenses in Speech-Language Pathology and Audiology.

[(a)] An applicant for dual licenses in speech-language pathology and in audiology as referenced in the Act shall meet the requirements set out in:

(1) Section 741.63 of this title (relating to a Waiver of Clinical and Examination Requirements

(2) Section 741.61 of this title (relating to Requirements for a Speech-Language Pathology License) and §741.81 of this title (relating to Requirements for an Audiology License) with the following exceptions.

[(A)] Instead of the number of semester credit hours of course work referenced in §741.61(b) of this title and §741.81(b) of this title, the applicant shall have completed:}]

[(i)] at least 42 semester credit hours in professional course work acceptable toward a graduate degree with at least 21 semester credit hours awarded graduate credit in speech-language pathology and at least 21 semester credit hours awarded graduate credit in audiology;}]

[(ii)] at least 30 semester credit hours acceptable toward a graduate degree in the area of speech-language pathology as follows:}]

[(I)] at least six graduate semester credit hours in speech disorders; and}]

[(II)] at least six graduate semester credit hours in language disorders;}]

[(iii)] at least 30 semester credit hours acceptable toward a graduate degree in the area of audiology as follows:}]

[(I)] at least six graduate semester credit hours in hearing disorders and hearing evaluations; and}]

[(II)] at least six graduate semester credit hours in habilitative/rehabilitative procedures with individuals who have hearing impairment.}]

[(B)] Instead of the number of hours of supervised clinical observation and experience referenced in §741.61(c) of this title and §741.81(c) of this title, the applicant shall have completed at least:}]

[(i)] 25 hours of supervised observation in evaluation and treatment of children and adults with disorders of speech, language, or hearing prior to beginning 600 graduate credit hours of direct clinical experience; and}]

[(ii)] 400 minimum graduate credit hours of clinical experience with at least 325 hours in speech-language pathology under direction of a graduate degreed licensed speech-language pathologist and at least 52 weeks at 35 hours per week hours in audiology under direction of a graduate degreed licensed audiologist.}]

[(b)] Academic credit for clinical experience cannot be used to satisfy the minimum requirements of at least 21 graduate semester credit hours in speech-language pathology and at least 21 graduate semester credit hours in audiology.}]

[(c)] Transcripts shall be evaluated as set out in either §741.61(b) of this title or §741.81(b) of this title.}]

[(d)] A speech-language pathology license and an audiology license shall be issued individually.}]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §§741.101 - 741.103

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.101. Registration of Audiologists and Interns in Audiology to Fit and Dispense Hearing Instruments.

(a) (No change.)

(b) The audiology intern license and the temporary audiology certificate constitute registration to fit and dispense hearing instruments under the supervision of a [the] licensed audiologist approved by the board office to supervise the internship.

§741.102. General Practice Requirements of Audiologists and Interns in Audiology who Fit and Dispense Hearing Instruments.

In accordance with the Act, a licensed audiologist or licensed intern in audiology registered to fit and dispense hearing instruments shall:

(1) - (3) (No change.)

(4) inform the consumer of a hearing instrument by written contract of a trial period of 30 consecutive days. The contract shall include a specific date by which the client must return the instrument to qualify for a refund. If the date falls on a holiday, weekend, or a day the business is not open, the effective date shall be the first day the business reopens.

(A) The written contract shall include:

(i) ~~[(A)] all [AH] charges and fees associated with such trial period; [shall be stated in this contract which shall also include]~~

(ii) the licensee's printed name and license number;
and

(iii) the name, address, and telephone number of the State Board of Examiners for Speech-Language Pathology and Audiology. [The contract shall include the full printed name, signature, and license number of the audiologist dispensing the hearing instrument.]

(B) The purchaser shall receive a copy of this contract.

(C) ~~[(B)]~~ Any purchaser of a hearing instrument shall be entitled to a refund of the purchase price advanced by purchaser for the hearing instrument, less the agreed-upon amount associated with the trial period, upon return of the instrument to the licensee in good working order within the trial period. Should the order be canceled by purchaser prior to the delivery of the instrument, the licensee may retain the agreed-upon charges and fees as specified in the written contract. The purchaser shall receive the refund due no later than the 30th day after the date on which the purchaser cancels the order or returns the hearing instrument to the licensee.

(5) Verify [When amplification is fit, the audiologist shall verify] appropriate fit of the hearing instrument(s) [amplification], which may include real ear measures, functional gain measures, or other professionally accepted measures.

§741.103. Requirements of Audiologists and Interns in Audiology Conducting Audiometric Testing for the Purpose of Fitting and Dispensing Hearing Instruments.

In accordance with the Act, a licensed audiologist or licensed intern in audiology who fits and dispenses hearing instruments, shall comply

with this section when testing hearing for the purpose of determining the need for amplification and the verification of the appropriate fit of hearing instrument(s).

(1) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kerry Ormson

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER I. APPLICATION PROCEDURES

22 TAC §741.111, §741.112

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.111. Application Process [Submission].

(a) - (e) (No change.)

§741.112. Required Application Materials.

(a) An applicant applying for a speech-language pathology or audiology license under §741.61 of this title (relating to Requirements for a Speech-Language Pathology License) or §741.81 of this title (relating to Requirements for an Audiology License) shall submit the following:

(1) - (3) (No change.)

(4) if not previously submitted when applying for an intern's license [intern], a Course Work and Clinical Experience Form [an original board course work and clinical experience form] completed by the program director or designee of the college or university attended which verifies the applicant has met the requirements established in §741.61(b) - (c) of this title or §741.81(b) - (c) of this title;

(5) a Report of Completed Internship Form [an original board report of completed internship form] completed by the applicant's supervisor and signed by both the applicant and the supervisor; however, if the internship was completed out-of-state, the supervisor shall also submit a copy of his or her diploma or transcript showing the master's degree in one of the areas of communicative sciences and disorders had been conferred and a copy of a valid license to practice in that state. If that state did not require licensure, the supervisor shall submit an original letter from the American Speech-Language-Hearing Association stating the certificate of clinical competence was held

when the applicant completed the internship in addition to proof of a master's degree in communicative sciences and disorders; and

(6) a Praxis Exam Score Report [~~an original or certified statement from the Educational Testing Service~~] showing the applicant passed the examination described in §741.121 of this title (relating to Examination Administration) within the time period established in §741.61(e) or §741.81(e) of this title.

(b) An applicant applying for an intern in speech-language pathology license under §741.62 of this title (relating to Requirements for an Intern in Speech-Language Pathology License) or an intern in audiology license under §741.82 of this title (relating to Requirements for an Intern in Audiology License) shall submit the following:

(1) - (4) (No change.)

(5) a Course Work and Clinical Experience Form [~~an original board course work and clinical experience form~~] completed by the university program director or designee of the college or university attended which verifies the applicant has met the requirements established in §741.61(b) - (c) of this title or §741.81(b) - (c) of this title; and

(6) an Intern Plan and Agreement of Supervision Form [~~a current, original board intern plan and agreement of supervision form~~] completed by the proposed supervisor and signed by both the applicant and the proposed supervisor.

(c) (No change.)

(d) An applicant applying for an assistant in speech-language pathology license under §741.64 of this title (relating to Requirements for an Assistant in Speech-Language Pathology License) or an assistant in audiology license under §741.84 of this title (relating to Requirements for an Assistant in Audiology License) shall submit the following:

(1) - (2) (No change.)

(3) a Supervisory Responsibility Statement Form [~~current, original board supervisory responsibility statement form~~] completed by the licensed supervisor who agrees to accept responsibility for the services provided by the assistant and signed by both the applicant and the proposed supervisor;

(4) (No change.)

(5) if not previously submitted, a Clinical Observation and Clinical Experience Form [~~an original board clinical observation and experience form~~] completed by the university program director or designee of the college or university training program verifying the applicant completed the requirements set out in §741.64(a)(3) of this title or §741.84(b)(3) of this title; and

(6) for an applicant who did not obtain the hours referenced in paragraph (5) of this subsection, a Clinical Deficiency Plan Form [~~clinical deficiency plan~~] to obtain the hours lacking.

(e) An applicant applying for a speech-language pathology temporary certificate of registration under §741.65 of this title (relating to Requirements for a Temporary Certificate of Registration in Speech-Language Pathology) or an audiology temporary certificate of registration under §741.85 of this title (relating to Requirements for a Temporary Certificate of Registration in Audiology) shall submit the following:

(1) - (3) (No change.)

(4) a Course Work and Clinical Experience Form [~~an original board course work and clinical experience form~~] completed by the university program director or designee of the college or university

attended which verifies the applicant has met the requirements established in §741.61(b) - (c) of this title or §741.81(b) - (c) of this title;

(5) a Report of Completed Internship Form [~~an original board report of completed internship form~~] completed by the applicant's supervisor and signed by both the applicant and the supervisor; however, if the internship was completed out-of-state, the supervisor shall also submit a copy of his or her diploma or transcript showing the master's degree in one of the areas of communicative sciences and disorders had been conferred and a copy of a valid license to practice in that state. If that state did not require licensure, the supervisor shall submit an original letter from the American Speech-Language-Hearing Association stating the certificate of clinical competence was held when the applicant completed the internship in addition to proof of a master's degree in communicative sciences and disorders; [~~and~~]

(6) a Temporary Supervisory Form completed by the applicant's proposed supervisory and signed by both the applicant and the supervisor; and

(7) [~~{6}~~] an applicant who completed the internship in another state and graduated from a college or university with a program not accredited by the American Speech-Language-Hearing Association, shall submit an original, signed letter from the American Speech-Language-Hearing Association stating the Clinical Certification Board accepted the course work, clinical practicum and the clinical fellowship year.

(f) - (g) (No change.)

(h) After December 31, 2009, all applicants for licensure shall [~~must~~] submit proof of successful completion of the jurisprudence examination at the time of application. The jurisprudence examination must be completed no more than six months prior to the date of licensure application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. LICENSURE EXAMINATIONS

22 TAC §741.121, §741.122

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.121. *Examination Administration.*

(a) The examination required by the Act shall be the examination administered by the Educational Testing Service. ~~[To request a registration form, contact the Educational Testing Service, Praxis Series, P.O. Box 6050, Princeton, New Jersey 08541-6050.]~~

~~[(b) Separate tests shall be administered in speech-language pathology and in audiology.]~~

~~[(c) An applicant shall pay the required fee directly to the testing service.]~~

~~[(d) An applicant shall indicate on the registration form the Code R8327 assigned to the board so that the applicant's test score will be sent to the board.]~~

~~[(b) [(e)] An applicant shall have passed the examination if the score is 600 or above.~~

~~[(f) An applicant will be notified of the results of the examination by the testing service.]~~

§741.122. *Jurisprudence Examination.*

(a) The department shall develop and administer a jurisprudence examination to determine an applicant's knowledge of the Act, this chapter ~~[section]~~, and any other applicable laws of this state affecting the practice of speech-language pathology or audiology.

(b) The examination shall be administered in a web-based format through an examination contract, which specifies that applicants for examination must be able to:

(1) (No change.)

(2) receive their ~~[examination]~~ results electronically immediately upon completion of the examination.

(c) (No change.)

(d) After December 31, 2009, all applicants for licensure shall ~~[must]~~ submit proof of successful completion of the jurisprudence examination at the time of application. The jurisprudence examination must be completed no more than six months prior to the date of licensure application.

(e) For all licensees renewing after December 31, 2009, the jurisprudence examination shall be completed in order to renew the license. Licensees shall be required to complete the jurisprudence examination for only one renewal period. The jurisprudence examination shall be completed no more than six months prior to the date of licensure renewal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. ISSUANCE OF LICENSE

22 TAC §741.141

STATUTORY AUTHORITY

The amendment is authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendment affects Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.141. *Issuance of License.*

(a) Except as provided by subsections (b) and (c) of this section, the board shall issue an initial license to an applicant for a license after the fee, forms, and other documentation have been received and approved by the board or board staff. A license will be issued for a two-year pro-rated term, as determined by the board, expiring in the licensee's birth month. ~~[The effective date shall be the date of receipt by the board office or board's designee of the last item required for approval.]~~ The expiration date shall be determined as follows.

(1) - (2) (No change.)

(b) The board shall issue an initial license to an applicant for an intern in speech-language pathology or an intern in audiology license after the fee, forms, and other documentation have been received and approved by the board or board staff. ~~[The effective date shall be the date of receipt by the board office of the last item required for approval.]~~ The license shall expire one year past the effective date.

(c) The board shall issue a temporary certificate of registration in speech-language pathology or a temporary certificate of registration in audiology to an applicant after the fee, forms, and other documentation have been received and approved by the board or board staff. ~~[The effective date shall be the date of receipt by the board office of the last item required for approval.]~~ The registration shall expire eight weeks after the next scheduled examination as required by §741.121 of this title (relating to Examination Administration). This certificate is non-renewable and there is no allowed grace period after expiration of the certificate.

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER L. LICENSE RENEWAL AND CONTINUING EDUCATION

22 TAC §§741.161, 741.162, 741.164, 741.165

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.161. Renewal Procedures.

(a) - (d) (No change.)

(e) A licensee or registrant is responsible for submitting the required fee, forms, and other documentation prior to the expiration date of the license. ~~[The postmark date is the effective date of the renewal. If all required documentation is submitted online, the effective date of submission is the date of the online transaction.]~~

(f) (No change.)

(g) The board office shall not consider a license to be renewed until the following has been received and found acceptable:

(1) - (3) (No change.)

(4) If the licensee chooses to use the online renewal process, the renewal form and renewal fee, as detailed in paragraphs (1) and (2) of this subsection, will be accepted automatically. The license will be considered renewed when the online renewal is processed in the board office and board staff determine that all documentation has been provided. ~~[If no additional information is required, the effective date of renewal shall be the date of the online transaction.]~~ If additional documentation is required, such as documentation for an audit as defined in subsection (o) of this section, that documentation must be mailed to the board office. Although the license may complete the renewal process online, the board office shall not consider the license renewed until the additional documentation has been received and accepted by the board office.

(h) An intern shall submit the following for license renewal:

(1) - (2) (No change.)

(3) an Intern Plan and Agreement of Supervision Form ~~[the intern plan and agreement of supervision form]~~ for the intern's upcoming experience unless the intern is currently not practicing. In that event, the intern shall submit a signed statement explaining the reason for not practicing.

(i) An assistant shall submit the following for license renewal:

(1) (No change.)

(2) A Supervisory Responsibility Statement Form from each supervisor providing the supervision ~~[the supervisory responsibility statement form]~~ unless the assistant is currently not practicing or the supervisor(s) ~~[supervisor]~~ has not changed.

(j) - (t) (No change.)

(u) For all licenses renewing after December 31, 2009, the jurisprudence examination shall ~~[must]~~ be completed in order to renew the license. Licensees shall be required to complete the jurisprudence examination for only one renewal period.

(v) (No change.)

§741.162. Requirements for Continuing Professional Education.

(a) - (b) (No change.)

(c) A minimum of twenty ~~[Twenty]~~ clock hours (two CEUs) shall be required to renew a license issued for a two-year term. The

holder of dual licenses, meaning both a speech-language pathology license and an audiology license, shall be required to earn 30 clock hours (three CEUs) to renew a license issued for a two-year term. Effective April 30, 2009, a license holder must complete a minimum of 2.0 clock hours (0.2 CEUs) in ethics as part of the continuing education requirement.

(d) - (l) (No change.)

(m) The audit process shall be as follows.

(1) - (2) (No change.)

(3) Failure to ~~[timely]~~ furnish this information in a timely manner or providing false information during the audit or renewal process are grounds for disciplinary action against the licensee.

(4) (No change.)

(n) (No change.)

§741.164. Late Renewal of a License.

(a) A licensee who fails to renew their ~~[his or her]~~ license before the end of the 60-day grace period shall be assessed a late renewal penalty as required by the Act, unless the license had been placed on inactive status.

(b) - (i) (No change.)

§741.165. Renewal of Licensee on Active Military Duty.

If a licensee fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the licensee may renew the license as follows.

(1) Renewal of the license shall ~~[may]~~ be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §741.163

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the State Board of Examiners for Speech-Language Pathology and Audiology or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority

to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The repeal affects Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.163. Inactive Status.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER M. FEES AND PROCESSING PROCEDURES

22 TAC §741.181, §741.182

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.181. Schedule of Fees.

(a) All fees paid to the board are non-refundable. For all applications and renewal applications, the board is authorized to collect subscription and convenience fees, in amounts determined by tex.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through tex.gov [Texas Online]. For all applications and renewal applications, the board is authorized to collect fees to fund the Office of Patient Protection within the Health Professions Council, as required by Occupations Code, §101.307 (relating to Health Professions Council Funding of Office.) The schedule of fees is as follows:

(1) - (9) (No change.)

(10) criminal history evaluation letter fee--\$50.

(b) - (d) (No change.)

§741.182. Time Periods for [~~For~~] Processing Applications and Renewals.

(a) Within 15 working days of the board's receipt of a new application and supporting documentation, the board office shall:

(1) - (2) (No change.)

(b) (No change.)

(c) Within 15 working days of the board's receipt of a request to renew a license and any applicable documentation, the board office shall:

(1) - (2) (No change.)

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER N. COMPLAINTS, VIOLATIONS, PENALTIES, AND DISCIPLINARY ACTIONS

22 TAC §§741.191 - 741.202

STATUTORY AUTHORITY

The amendments and new rule are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The amendments and new rule affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.191. Complaint Procedures.

(a) (No change.)

(b) Upon receipt of a complaint, the executive director shall send an acknowledgment letter to the complainant along with [~~and~~] an official form which the complainant must complete and return to the board before further action may be taken. The executive director may accept an anonymous complaint if there is sufficient information for the investigation.

(c) A complaints committee shall be appointed to work with the executive director to:

(1) review and determine whether each [~~the~~] complaint fits within the category of a serious complaint affecting the health and safety of clients or other persons;

(2) - (4) (No change.)

(d) (No change.)

(e) If it is determined that the matters alleged in the complaint are non-jurisdictional, or if the matters alleged in the complaint would not constitute a violation of the Act or this chapter, the executive director [~~Executive Director~~] may dismiss the complaint and give written notice of dismissal to the licensee or person against whom the complaint has been filed, the complainant, and the complaints committee.

(f) If it is determined that [~~there are sufficient grounds to support the complaint,~~] the matters in the complaint are jurisdictional, the

complaint ~~[question]~~ shall be investigated. The executive director or the committee may initiate the investigation.

(g) (No change.)

(h) If the board has the authority to resolve a written complaint, at least quarterly and until final disposition of the complaint, the board shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

~~[(h) The board shall use a private investigator only if the department's investigators available to the board have a conflict of interest.]~~

~~[(i) If a written complaint is filed with the board that the board has the authority to resolve, the board, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.]~~

(i) ~~[(i)]~~ After review of ~~[If after due investigation]~~ a complaint or allegation is not resolved by the committee, the committee may:

(1) dismiss the complaint;

(2) revoke, or suspend, or deny the license; or

(3) take other appropriate action [recommend that the liicense be revoked, suspended, or denied or that other appropriate actions] as authorized by law be taken.

§741.192. Disciplinary Action; Notices.

(a) - (b) (No change.)

(c) If denial, revocation, or suspension of a license is proposed, the committee ~~[board]~~ shall give written notice by regular and certified mail, return receipt requested, to the licensee notifying the licensee of the committee's proposed action and the licensee's options for resolving the complaint. A resolution to a complaint include, but are not limited to, a licensee showing compliance with the law/rules; a licensee's surrender of his or her license, a licensee's compliance with the committee's proposed action; and a licensee's request for an information conference and/or formal hearing. If the licensee request an formal hearing it must be requested within 15 working days of the receipt of the notice. [; or regular mail of the basis for the proposal and that the licensee or applicant must request, in writing, a formal hearing within 15 working days of receipt of the notice, or the right to a hearing shall be waived and the license shall be denied, revoked, or suspended.]

(d) (No change.)

§741.193. Revocation, Suspension, Emergency Suspension, or Denial.

(a) - (b) (No change.)

(c) Upon the revocation, suspension or non-renewal of a license, a licensee shall return his or her license certificate and all existing renewal cards to the executive director [Executive Director].

(d) The board or the complaints committee of the board may suspend a license on an emergency basis.

(1) A [The] license may be suspended without prior notice to the licensee and without a prior hearing.

(2) In order to suspend a license on an emergency basis, the board or complaints committee must determine that [whether] continued practice by a license holder would constitute a continuing and imminent threat to the public welfare.

(3) (No change.)

(4) The board or complaints committee shall issue an order suspending the license. The order shall be effective on the [upon delivery to the licensee or at a later] date specified in the order.

(5) Proceedings for a formal hearing must be initiated prior to, or simultaneously on, the effective date of the emergency suspension.

(A) (No change.)

(B) If there is a conflict between the requirement of the Administrative Procedure Act and the requirements of this [the] Act, then the requirements of this [the] Act shall govern.

(6) - (8) (No change.)

§741.194. Informal Disposition.

(a) - (m) (No change.)

(n) The licensee or applicant may either accept or reject the recommendations of ~~[at]~~ the informal conference. If the recommendations are accepted, an agreed order shall be prepared by the board office or the board's legal counsel and forwarded to the licensee or applicant. The order may contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within 10 working days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the recommendations.

(o) - (t) (No change.)

~~[(u) If a licensee who has requested an informal conference fails to appear at the conference and fails to provide notice of the licensee's inability to attend the conference at least 24 hours in advance of the time the conference is scheduled, such action may constitute a withdrawal of the request for a formal hearing.]~~

§741.195. Formal Hearings; Surrender of License.

(a) - (e) (No change.)

(f) If a right to a hearing is waived under §741.192(c) of this title (relating to Disciplinary Action; Notices), the board shall consider an order denying, suspending, probating, or revoking the license or registration as described in written notice to the licensee or applicant.

(1) The licensee or applicant and the complainant shall be notified of the date, time, and place of the board meeting at which the default order will be considered. Attendance by the licensee or applicant is voluntary.

(2) (No change.)

(g) - (i) (No change.)

§741.196. Default Orders.

(a) (No change.)

~~[(b) The licensee or applicant and the complainant shall be notified of the date, time, and place of the board meeting at which the default order will be considered. Attendance is voluntary.]~~

(b) [(e)] Upon an affirmative majority vote, the board shall enter an order imposing appropriate disciplinary action or an order of application denial.

§741.197. Monitoring of Licensees.

(a) (No change.)

(b) Each licensee who [that] has had disciplinary action taken against his or her license shall be required to submit regularly scheduled

reports to the executive director, if directed by the board. The reports shall be scheduled at intervals appropriate to each individual situation.

(c) - (d) (No change.)

§741.198. Administrative Penalties.

(a) (No change.)

(b) The amount of an administrative penalty shall be based on the following criteria.

(1) (No change.)

(2) The range of administrative penalties by levels is as follows:

(A) Level I--~~not more than~~ ~~[up to]~~ \$5,000 per day;

(B) Level II--~~not more than~~ ~~[up to]~~ \$2,500 per day; or

(C) Level III--~~not more than~~ ~~[up to]~~ \$1,250 per day.

(3) Subsequent violations at ~~[in]~~ the same level for which an administrative penalty has previously been imposed may be categorized at the next higher level.

(4) (No change.)

§741.199. Schedule of Sanctions.

(a) - (c) (No change.)

(d) Relevant Factors. When a licensee has violated the Act or this chapter, three general factors combine to determine the appropriate sanction, which include: the culpability of the licensee; the harm caused or posed; and the requisite deterrence. It is the responsibility of the licensee to bring exonerating factors to the attention of the complaints committee or the administrative law judge. Specific factors are to be considered as set forth as follows.

(1) (No change.)

(2) Nature of the violation. The following factors are identified:

(A) - (B) (No change.)

(C) the moral culpability of the licensee, such as whether the violation was:

(i) - (ii) (No change.)

(iii) an omission, unintentional ~~[resulted from simple error]~~ or inadvertence; and

(D) (No change.)

(3) - (5) (No change.)

(e) - (f) (No change.)

§741.200. Licensing of Persons with Criminal Convictions.

(a) - (d) (No change.)

(e) Procedures for disciplinary action or application denial against persons with criminal convictions.

(1) (No change.)

(2) If the board takes disciplinary action or denies an application under this section, the executive director will give the person written notice of the reasons for each board decision ~~[the decisions]~~.

§741.201. Suspension of License Relating to Child Support and Child Custody.

(a) (No change.)

(b) The board shall implement the terms of a final court or attorney general's order suspending a license without additional review

or hearing. The board will provide notice as appropriate to the licensee and ~~[or]~~ to others concerned with the license.

(c) - (h) (No change.)

§741.202. Request for Criminal History Evaluation Letter.

(a) In accordance with Occupations Code, §53.102, a person may request the department to issue a criminal history evaluation letter regarding the person's eligibility for a license if the person:

(1) is enrolled or planning to enroll in an educational program that prepares a person for an initial license or is planning to take an examination for an initial license; and

(2) has reason to believe that the person is ineligible for the license due to a conviction or deferred adjudication for a felony or misdemeanor offense.

(b) A person making a request for issuance of a criminal history evaluation letter shall submit the request on a form prescribed by the department, accompanied by the criminal history evaluation letter fee and the required supporting documentation, as described on the form. The request shall state the basis for the person's potential ineligibility.

(c) The department has the same authority to investigate a request submitted under this subsection and the requestor's eligibility that the department has to investigate a person applying for a license.

(d) If the department determines that a ground for ineligibility does not exist, the department shall notify the requestor in writing of the determination. The notice shall be issued not later than the 90th day after the date the department received the request form, the criminal history evaluation letter fee, and any supporting documentation as described in the request form.

(e) If the department determines that the requestor is ineligible for a license, the department shall issue a letter setting out each basis for potential ineligibility and the department's determination as to eligibility. The letter shall be issued not later than the 90th day after the date the department received the request form, the criminal history evaluation letter fee, and any supporting documentation as described in the request form. In the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the department at the time the letter is issued, the department's ruling on the request determines the requestor's eligibility with respect to the grounds for potential ineligibility set out in the letter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005417

Kerry Ormson

Presiding Officer

State Board of Examiners for Speech-Language Pathology and Audiology

Earliest possible date of adoption: October 31, 2010

For further information, please call: (512) 458-7111 x6972



SUBCHAPTER O. TELEHEALTH

22 TAC §§741.211 - 741.215

STATUTORY AUTHORITY

The new rules are authorized under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

The new rules affect Texas Occupations Code, Chapter 401. Review of the sections implements Government Code, §2001.039.

§741.211. Definitions.

The following words and terms when used in this chapter shall have the indicated meanings unless the context clearly indicates otherwise.

(1) Board--The Texas State Board of Examiners for Speech-Language Pathology and Audiology.

(2) Client--A consumer of telehealth services.

(3) Client/Patient Site--Location of the patient or client at the time the service is being furnished via telecommunications.

(4) Clinician Site--Site at which the speech-language pathologist or audiologist delivering the service is located at the time the service is provided via telecommunications.

(5) Consultant--Any professional who collaborates with a provider of telehealth services to provide services to clients.

(6) Facilitator--Individual at the client site who facilitates the telehealth service delivery at the direction of the audiologist or speech-language pathologist.

(7) Provider--A speech-language pathologist or audiologist fully licensed by the board who provides telehealth services.

(8) Telehealth--The use of telecommunications and information technologies for the exchange of information from one site to another for the provision of speech-language pathology or audiology services to a client from a provider.

(9) Telehealth Service--The application of telecommunication technology to deliver speech-language pathology and/or audiology services at a distance for assessment, intervention, and/or consultation.

(10) Telepractice--The practice of telehealth.

§741.212. Service Delivery Models.

(a) Telehealth may be delivered in a variety of ways, including, but not limited to those set out in this section.

(1) Store-and-forward model/electronic transmission is an asynchronous electronic transmission of stored clinical data from one location to another.

(2) Clinician interactive model is a synchronous, real time interaction between the provider and client or consultant that may occur via telecommunication links.

(b) Self-monitoring/testing model refers to when the client or consultant receiving the services provides data to the provider without a facilitator present at the site of the client or consultant.

(c) Live versus stored data refers to the actual data transmitted during the telepractice. Both live, real-time and stored clinical data may be included during the telepractice.

§741.213. Guidelines for the Use of Telehealth.

(a) A provider shall comply with the board's Code of Ethics and Scope of Practice requirements when providing telehealth services.

(b) The scope, nature, and quality of services provided via telehealth are the same as that provided during in-person sessions by the provider.

(c) The quality of electronic transmissions shall be appropriate for the provision of telehealth services as if those services were provided in person.

(d) A provider shall only utilize technology with which they are competent to use as part of their telehealth services.

(e) Equipment used for telehealth services at the clinician site shall be maintained in appropriate operational status to provide appropriate quality of services.

(f) Equipment used at the client/patient site at which the client or consultant is present shall be in appropriate working condition and deemed appropriate by the provider.

(g) The initial contact between the provider and client shall be at the same physical location to assess the client's candidacy for telehealth, including behavioral, physical, and cognitive abilities to participate in services provided via telecommunications.

(h) A provider shall be aware of the client or consultant level of comfort with the technology being used as part of the telehealth services and adjust their practice to maximize the client or consultant level of comfort.

(i) When a provider collaborates with a consultant from another state in which the telepractice services are delivered, the consultant in the state in which the client receives services shall be the primary care provider for the client.

(j) As pertaining to liability and malpractice issues, a provider shall be held to the same standards of practice as if the telehealth services were provided in person.

(k) A provider shall be sensitive to cultural and linguistic variables that affect the identification, assessment, treatment, and management of the clients.

(l) Upon request, a provider shall submit to the board data which evaluates effectiveness of services provided via telehealth including, but not limited to, outcome measures.

(m) Telehealth providers shall comply with all laws, rules, and regulations governing the maintenance of client records, including client confidentiality requirements, regardless of the state where the records of any client within this state are maintained.

(n) Notification of telehealth services should be provided to the client, the guardian, the caregiver, and the multi-disciplinary team, if appropriate. The notification shall include, but not be limited to: the right to refuse telehealth services, options for service delivery, and instructions on filing and resolving complaints.

§741.214. Limitations of Telehealth Services.

Telehealth services may not be provided by correspondence only, e.g., mail, email, faxes, although they may be adjuncts to telepractice.

§741.215. Requirements of Personnel Providing Telehealth Services.

(a) A provider of telehealth services who practices in the State shall be licensed by the board.

(b) A provider of telehealth services shall be competent in both the type of services provided and the methodology and equipment used to provide the service.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 17, 2010.

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TITLE 30. ENVIRONMENTAL QUALITY

**PART 1. TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**CHAPTER 334. UNDERGROUND AND
ABOVEGROUND STORAGE TANKS**

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) proposes amendments to §§334.42, 334.45, 334.49, and 334.50; and new §§334.601 - 334.606.

**BACKGROUND AND SUMMARY OF THE FACTUAL BASIS
FOR THE PROPOSED RULES**

These rules create an underground storage tank (UST) operator training program in order to meet federal requirements contained in the Federal Energy Policy Act of 2005 (Pub.L. 109-58, August 8, 2005, 119 Stat. 294, codified at 42 United States Code 15801), (Energy Act). The Energy Act required states to implement programs which would provide for the training of persons responsible for the on-site operation and maintenance of UST systems by August 8, 2012. The operator training program being proposed in new Subchapter N meets the requirements of the Energy Act and is consistent with the United States Environmental Protection Agency's (EPA) "Grant Guidelines To States For Implementing The Operator Training Provision Of The Energy Policy Act Of 2005."

In addition, changes to Subchapter C, Technical Standards, are proposed to simplify and clarify the existing rules in the areas of secondary containment, sumps, and corrosion protection.

SECTION BY SECTION DISCUSSION

Subchapter C: Technical Standards

TCEQ proposes to amend §334.42(i): (1) by adding language which more clearly specifies which UST sumps must be inspected and kept liquid and debris free to address stakeholder and investigator concerns; (2) by adding language specifying that liquid and debris found during any agency or agency-authorized inspections must also be removed and properly disposed to address agency investigator concerns; and (3) by amending language to allow more time for removal and proper disposal of liquid and debris to address stakeholder concerns.

Section 334.45(d)(1)(E)(ii) is proposed to be amended to simplify requirements by increasing to 35% the amount of existing piping which can be replaced without triggering secondary containment requirements and by stating that if the replaced portion of existing piping exceeds 35% or connects to a new dispenser, only the replaced portion of piping need be secondarily contained to address stakeholder concerns that the existing requirements could in some cases prevent an owner from choosing to make an upgrade to a tank system. Section 334.45(d)(1)(E)(iv) and (vi) are proposed to be amended by adding language which

clarifies which sumps and manways require testing, inspection, and sensor probes to address stakeholder and investigator concerns. Section 334.45(d)(1)(E)(vii) is proposed to be amended to allow more time to properly dispose of liquids in sumps to address stakeholder concerns and by adding debris to the content of sumps which must be properly disposed of upon discovery to address investigator concerns and to correct an oversight in previous rulemaking.

To address stakeholder questions and investigator concerns, §334.49(a)(4) is proposed to be amended by adding language which clarifies the section's applicability to both existing and new UST systems to assure that the applicability of the section is understood to be universal. Language is also added to clearly specify that the section's requirements also apply not just to underground but also to totally or partially submerged metal components, in keeping with the intent of existing rule language which requires underground metal components to be protected from corrosion if they are in contact with groundwater or any other water. Section 334.49(b)(6) is proposed to be amended by deleting language which allows submersible pump risers and housings to be protected from corrosion by just coating and wrapping with a dielectric to assure continuity with the added language in §334.49(a)(4) and to correct an oversight in previous rulemaking.

Section 334.50(b)(2)(A)(i) is proposed to be simplified by adding language exempting airport hydrant systems from automatic line leak detection requirements because there are no practical methodologies available which will provide this function.

Subchapter N: Operator Training

New Subchapter N, Operator Training, is proposed to create a UST facility operator training program to implement requirements of the Energy Act.

New §334.601 describes the purpose and applicability of the subchapter.

New §334.602 requires UST owners and operators to designate classes of operators to meet the training requirements and requires those classes to be administered in accordance with this subchapter.

New §334.603 describes the types of acceptable training and certification processes that meet the requirements of this subchapter.

New §334.604 establishes deadlines relating to this subchapter's operator training requirements. Per the deadlines established in the Energy Act, August 8, 2012, is the deadline for the initial training of all classes of operators.

New §334.605 describes how frequently the classes of operators must be re-trained. Specifically, the proposed rule would require Class A, B, and C operators to be re-trained every three years, with the additional requirement that Class B operators must be re-trained if a notice of violation indicating substantial non-compliance with this chapter is issued to a facility.

New §334.606 describes how the documentation of operator training must be maintained by owners and operators of UST facilities and must be made available to investigators upon request.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules create a UST operator training program in order to meet federal requirements contained in the Federal Energy Policy Act of 2005. The Energy Act requires states to implement programs that provide training of persons responsible for the on-site operation and maintenance of UST systems by August 8, 2012. In addition, staff recommends making changes to technical tank requirements in order to clarify existing applicable rules and facilitate compliance regarding secondary containment, sumps and, corrosion protection.

Examples of facilities with UST systems include service station/convenience stores, car dealerships, rental car businesses, and governmental entities with fueling facilities. Staff estimates that there may be as many as 18,000 active registered UST facilities in the state with approximately 6,054 of those being owned or operated by governmental entities. Of the 6,054 UST facilities owned or operated by governmental entities, 1,244 are estimated to be state facilities and 4,810 are facilities owned by local governments.

The proposed rules require UST facilities to have at least one trained and certified operator in each of three categories: Class A operator, Class B operator, and Class C operator. Training and certification costs are not expected to have a significant impact on governmental entities under the proposed rules. Online training and certification is available through several sources, and the agency will approve training and certification sources to ensure that training and certification meets federal guidelines. This approval process is not expected to result in significant costs for the agency.

Based on International Code Council training and certification costs for UST operators, estimated training and certification costs for Class A and Class B operators are expected to be no more than \$115 per operator every three years. Class B operators will be able to train Class C operators in-house, and therefore, training and certification costs for Class C operators are not expected to exceed \$15 per operator every three years. Under the proposed rules, Class A and Class B operators can operate more than one UST facility, which has the potential to further reduce the significance of any training and certification cost to any regulated entity.

The proposed rules also clarify technical tank requirements and facilitate compliance. Units of state or local government should not experience significant fiscal impacts as a result of these proposed revisions. The proposed rules are expected to reduce overall costs for UST system improvements while continuing to protect the environment by modifying secondary containment requirements. The proposed changes are expected to provide greater assurance of compliance with technical requirements and a reduction in contamination clean up costs.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with federal law and increased protection of the environment and public health and safety.

The proposed rules require that operators of UST facilities be trained and certified. Based on International Code Council training and certification costs for UST operators, individuals are not expected to experience significant fiscal impacts as a result of the proposed rules since training and certification costs are not expected to be more than \$115 per operator every three years for Class A and Class B operators and \$15 per operator every three years for Class C operators.

Training and certification costs are not expected to have a significant impact on businesses under the proposed rules. Staff estimates that there may be as many as 9,916 large businesses with UST facilities. Businesses can choose whether to pay training and certification costs or require operators to pay for their own training and certification. Online training and certification is available through several sources. Training and certification costs are the same for a business as they would be for an individual. Since Class A and Class B operators can operate more than one UST facility, the fiscal impact of any training and certification cost incurred by businesses may be further reduced.

Businesses should not experience significant fiscal impacts as a result of proposed revisions to tank requirements. The proposed rules, by modifying secondary containment requirements, are expected to reduce overall costs for UST system improvements while continuing to protect the environment.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No significant adverse fiscal implications are anticipated for small or micro-businesses. There may be as many as 2,030 small businesses that own or operate UST facilities in the state. Small businesses will be expected to have trained and certified operators under the proposed rules. Based on International Code Council training and certification costs for UST operators, training and certification costs are not expected to be more than \$115 per operator every three years for Class A and Class B operators and \$15 per operator every three years for Class C operators. In addition, Class A or Class B operators can operate more than one UST facility. Small businesses will also be required to comply with the same proposed revisions to tank requirements as a large business. However, those revisions are not expected to increase overall compliance costs.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect the environment, to comply with federal regulations, and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect

the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Regarding the first part of this definition, the specific intent of this rulemaking is to "protect the environment" by ensuring that UST operators are trained, which is anticipated to reduce the number of releases to the environment from USTs, and by making minor changes to UST technical requirements to areas such as corrosion protection and secondary containment which are intended to prevent or minimize releases to the environment. However, the second part of the definition of a "major environmental rule" is not met: the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The term, "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact. Although there are some cost impacts associated with operator training and some cost-saving impacts associated with the UST technical requirement revisions, neither are determined to have the above-described adverse effect on the state so as to constitute a "major environmental rule."

Further, even if it were considered a "major environmental rule," the rule proposal does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). That subsection states: "This section applies only to a major environmental rule adopted by a state agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law." These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of the Texas Government Code. Specifically, the proposed rules "do not exceed a standard set by federal law"; they do not "exceed an express requirement of state law"; they do not "exceed a requirement of a federal delegation agreement or contract"; and they are not "adopted solely under the general powers of the agency" but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY sections of this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to prevent releases and spills from USTs by requiring that UST operators be trained and by making certain minor changes to UST rules relating to such things as corrosion protection and secondary containment. The proposed rules would substantially advance this stated purpose by creating UST operator training requirements which will allow UST operators to be trained effectively and efficiently and by making minor changes to UST technical rules.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because certain portions of this action (operator training and secondary containment) fall under the exception listed in Texas Government Code, §2007.003(b)(4): "an action . . . reasonably taken to fulfill an obligation mandated by federal law." In addition, the proposed rules in total are an action in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rules are an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from USTs pose a threat to both soils and groundwater with which the public may come into contact. The proposed rules are "designed to significantly advance the health and safety purpose" by requiring operator training of those who are responsible for and in control of USTs which contain regulated substances and by requiring changes to technical rules which relate to prevention of releases from USTs. The intent of this training and of the technical changes is to reduce the likelihood of releases of contaminants to the environment. The proposed rules "do not impose a greater burden than is necessary to achieve the health and safety purpose" because the training requirements are narrowly tailored to the class of tank operators and narrowly tailored to specific training requirements which have a direct bearing on basic knowledge to prevent UST releases and spills. Additionally, the changes to the technical requirements are also narrowly tailored to achieve a health and safety purpose.

Nevertheless, the commission further performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The proposed rules implement the UST operator training portions of the Energy Act and make certain changes to the UST technical requirements. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. There are no burdens imposed on private real property from these proposed rules and the benefits to society are the proposed rules' effect of training UST operators (and clarifications of technical requirements relating to release prevention) such that occurrences of releases of regulated substances into the environment are reduced. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and

found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include two of the goals listed in 31 TAC §505.12: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and (2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking requires UST operators to be trained in maintaining and operating UST systems and therefore indirectly will aid in preventing releases to the environment from those systems, this rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the proposed rules for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances. Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to this rulemaking.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 26, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-017-334-CE. The comment period closes November 1, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Anton Rozsypal, Remediation Division at (512) 239-5755, Cullen McMorrow, Litigation Division at (512) 239-0607 or Maria Lebron, Remediation Division at (512) 239-1898.

SUBCHAPTER C. TECHNICAL STANDARDS

30 TAC §§334.42, 334.45, 334.49, 334.50

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which requires the commission to establish and approve, by rule, all general policy of the commission; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause, pollution of any of the water in the state. The amendments are also proposed under TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding USTs; TWC, §26.3475, which requires underground storage tank systems to comply with commission requirements for tank release detection equipment and spill and overfill equipment; TWC, §26.348, which directs the commission to adopt standards of performance maintaining a leak detection system; and the federal Energy Policy Act of 2005, (Pub.L. 109-58, August 8, 2005, 119 Stat. 294, codified at 42 United States Code 15801), (Energy Act), which requires states with authorized underground storage tank programs to implement secondary containment requirements.

The proposed amendments implement TWC, §§26.345, 26.3475, and 26.348. The proposed amendments also implement the portions of the Energy Act dealing with secondary containment of underground storage tank systems and underground storage tank operator training.

§334.42. General Standards.

(a) All components of any new or existing underground storage tank (UST) system subject to the provisions of this subchapter shall be designed, installed, and operated in a manner that will prevent releases of regulated substances due to structural failure or corrosion.

(b) For all components of any new or existing UST system subject to the provisions of this subchapter which contain, have contained, or will contain a regulated substance, the surfaces of such components which are in direct contact with the regulated substance shall be constructed of or lined with materials that are compatible with the substance stored in such components. Any compatibility determination or analysis shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(c) The owners and operators of UST systems subject to the provisions of this subchapter and those persons and/or business entities who engage in, perform, or supervise the installation, repair, or removal of UST systems shall be responsible for ensuring that those UST systems are designed, installed, repaired, removed, and operated in accordance with the provisions of this subchapter, as provided under §334.12(b) of this title (relating to Other General Provisions) and under the provisions of Chapter 70 of this title (relating to Enforcement).

(d) When provisions of this subchapter require compliance with a specific code or standard of practice developed by a nationally recognized association or independent testing laboratory, the most recent version of the referenced code in effect at the time of the regulated UST activity shall be applicable.

(e) Compliance with the provisions of this subchapter shall not relieve an owner or operator of an UST system from compliance with other applicable regulations legally developed by other governmental entities. This requirement is more fully discussed in §334.12(a) of this title.

(f) Unless otherwise stated in a variance approved by the agency in accordance with §334.43 of this title (relating to Variances and Alternative Procedures), the requirements of this subchapter shall take precedence if and when such requirements are determined to be in conflict with any provisions contained in the following:

(1) any code or standard of practice developed by a nationally recognized association or independent testing laboratory; and

(2) the manufacturers' specifications and instructions for installation and operation of UST equipment.

(g) Any underground component of an UST system installed on or after September 29, 1989, shall be properly protected from corrosion by one or more of the allowable methods in §334.49(b) of this title (relating to Corrosion Protection).

(h) Any new tank or line or dispenser installed as part of a UST system on or after January 1, 2009, shall incorporate secondary containment meeting the applicable requirements of §334.45(d) of this title (relating to Technical Standards for New Underground Storage Tank Systems).

(i) Any sumps (including dispenser sumps) or manways installed prior to January 1, 2009, which are utilized as a integral part of a UST release detection system to monitor the interstitial space of a secondarily contained piping system, and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be inspected at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight. Any liquid or debris found in them during that inspection or an agency or agency-authorized [an] inspection must be removed and properly disposed of within 96 [72] hours of discovery.

§334.45. *Technical Standards for New Underground Storage Tank Systems.*

(a) General requirements.

(1) Any new underground storage tank (UST) system installed on or after the effective date of this subchapter shall be in compliance with the provisions of this section during the entire operational life of the UST system.

(2) Any new UST system shall be designed, installed, and operated in a manner that will prevent releases due to structural failure or corrosion for the operational life of the UST system.

(3) The surfaces of all components of the new UST system which are in direct contact with a regulated substance shall be con-

structed of or lined with materials that are compatible with such regulated substances.

(4) All components of the new UST system which convey, contain, or store regulated substances shall be properly protected from corrosion in accordance with the applicable provisions in §334.49 of this title (relating to Corrosion Protection).

(5) All tanks, piping, and other ancillary equipment in a new UST system shall be installed in accordance with the requirements of §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems).

(b) Technical standards for new tanks.

(1) Tank design and construction. Each new tank shall be properly designed, constructed, and protected from corrosion in accordance with one or more of the methods listed in subparagraphs (A) - (G) of this paragraph, and in accordance with specific codes and standards of practice developed by nationally recognized associations and independent testing laboratories, as referenced in the following subparagraphs:

(A) The tank may be constructed of fiberglass-reinforced plastic. Tanks constructed under this method shall meet UL Standard 1316, "Standard for Safety for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures";

(B) The tank may be constructed of coated steel and equipped with a factory-installed cathodic corrosion protection system. Any tank constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be equipped with a factory-installed cathodic corrosion protection system meeting the appropriate design and operational requirements in §334.49(c)(1) of this title, and shall meet the following standards:

(i) UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids"; and

(ii) Part I of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks", or STI Standard, "Specification for sti-P, System of External Corrosion Protection of Underground Steel Storage Tanks."

(C) The tank may be constructed of coated steel and equipped with a field-installed cathodic corrosion protection system. Any tank constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be equipped with a field-installed cathodic protection system meeting the appropriate design and operational requirements in §334.49(c)(2) of this title, and shall meet the following standards:

(i) UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids"; and

(ii) NACE International Standard RP0285-95, "Corrosion Control of Underground Storage Tank Systems by Cathodic Protection."

(D) The tank may be factory-constructed either as a steel/fiberglass-reinforced plastic composite tank, or as a steel tank with a bonded fiberglass-reinforced plastic external cladding or as a steel tank with a bonded fiberglass reinforced polyurethane coating. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-applied external fiberglass-reinforced plastic or fiberglass reinforced

polyurethane cladding or laminate which has a total dry film thickness of 100 mils minimum and 125 mils nominal;

(ii) The tank shall be operated and maintained in accordance with the requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with one or more of the following standards:

(I) Part II of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks";

(II) Steel Tank Institute (STI) ACT-100, "Specification for External Corrosion Protection of FRP Composite Steel Underground Storage Tanks"; or

(III) any other UL, or STI, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standards listed in either subclause (I) or (II) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(E) The tank may be factory-constructed as a steel tank with a bonded polyurethane external coating. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-applied external polyurethane coating which has a minimum dry film thickness of 70 mils;

(ii) The tank shall be operated and maintained in accordance with the applicable requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with one or more of the following standards:

(I) Part IV of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks";

(II) Steel Tank Institute (STI) ACT-100-U, "Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks"; or

(III) any other UL, or STL, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standards listed in either subclause (I) or (II) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(F) The tank may be factory-constructed as a steel tank completely contained within a nonmetallic external tank jacket. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-constructed nonmetallic external jacket which provides both secondary containment and corrosion protection;

(ii) The tank shall be operated and maintained in accordance with the applicable requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with the following:

(I) Part III of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks"; or

(II) any other UL, or STI, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standard listed in subclause (I) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(G) The tank may be designed, constructed, and protected from corrosion by an alternate method which has been reviewed and determined by the agency to control corrosion and prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and safety and the environment than the methods described in subparagraphs (A) - (D) of this paragraph, in accordance with the procedures in §334.43 of this title (relating to Variances and Alternative Procedures).

(2) Spill and overflow prevention equipment. All new tanks shall be equipped with spill and overflow prevention equipment, in accordance with §334.51(b) of this title (relating to Spill and Overflow Prevention and Control).

(3) Release detection for new tanks. All new tanks shall be monitored for releases of regulated substances in accordance with §334.50 of this title (relating to Release Detection).

(4) Other new tank components.

(A) Fittings. All metallic tank fittings (e.g., bung hole plugs) shall be protected from corrosion and shall be either:

(i) isolated from the backfill material and groundwater or any other water;

(ii) thoroughly coated with a suitable dielectric material, in accordance with the tank manufacturer's specifications; or

(iii) cathodically protected in accordance with the applicable provisions in §334.49(c) of this title.

(B) Striker plates. Factory-installed striker plates shall be located on the interior bottom surface of each tank under all fill and gauge openings.

(C) Dielectric bushings or fittings. In order to provide electrical isolation of the tank from other connected metal components, all coated steel tanks equipped with either a factory-installed cathodic protection system or a factory-applied fiberglass-reinforced plastic laminate or cladding shall also be fitted with dielectric bushings or fittings at each tank opening where other metal UST system components are connected, except for unused openings closed with metal plugs and for openings where the connected component is non-metallic.

(c) Technical standards for new piping.

(1) Piping design and construction. All new underground piping (including associated valves, fittings, and connectors) in an UST system shall be properly designed, constructed, and protected from corrosion in accordance with one of the methods listed in subparagraphs (A) - (D) of this paragraph and in accordance with specific codes and standards of practice developed by nationally recognized associations and independent testing laboratories, as referenced in the following subparagraphs.

(A) The piping may be constructed of fiberglass-reinforced plastic. Piping constructed under this method shall meet the following standards:

(i) UL Standard 971, "Standard for Safety for Non-metallic Underground Piping for Flammable Liquids"; and

(ii) UL Standard 567, "Standard for Safety for Pipe Connectors for Petroleum Products and LP Gas."

(B) The piping may be constructed of coated steel. Piping constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be cathodically protected with a field-installed cathodic protection system meeting the appropriate design and operational requirements in §334.49(c) of this title, and shall meet the applicable provisions of the following standards.

(i) NFPA Standard 30, "Flammable and Combustible Liquids Code";

(ii) API Publication 1615, "Installation of Underground Petroleum Storage Systems";

(iii) API Publication 1632, "Cathodic Protection of Underground Storage Tanks and Piping Systems"; and

(iv) NACE International Standard RP0169-96, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems."

(C) The piping may be constructed of flexible non-metallic material. Piping constructed under this method shall meet the following standards:

(i) UL Standard 971, "Standard for Safety for Non-metallic Underground Piping for Flammable Liquids"; and

(ii) UL Standard 567, "Standard for Safety for Pipe Connectors for Petroleum Products and LP Gas."

(D) The piping may be designed, constructed, and protected from corrosion by an alternate method which has been reviewed and determined by the agency to prevent the release of any stored regulated substance in a manner that is no less protective of human health and the environment than the methods described in subparagraphs (A) and (B) of this paragraph. Any alternative methods must be submitted and approved in accordance with the procedures in §334.43 of this title.

(2) Release detection for new piping. All new piping shall be monitored for releases of regulated substances in accordance with §334.50(b)(2) of this title.

(3) Other new piping components.

(A) For piping systems in which regulated substances are conveyed under pressure to an aboveground dispensing unit, a UL-listed (or agency accepted equivalent listing by Underwriters' Laboratories of Canada (ULC)) emergency shutoff valve (also called a shear or impact valve) shall be installed in each pressurized delivery or product line and shall be securely anchored at the base of the dispenser. This shut-off valve shall include a fusible link, and shall be designed to provide a positive shut-off of product flow in the event that a fire, collision, or other emergency occurs at the dispenser end of the pressurized line.

(B) UL-listed (or agency accepted equivalent listing by Underwriter's Laboratories of Canada (ULC), or Factory Mutual Research Corporation (FMRC)) flexible connectors shall be installed at both ends of each pressurized product or delivery line to provide flexibility and to allow for vertical and horizontal movement in the piping, unless inherently flexible piping is installed in accordance with manufacturer's requirements and in accordance with an applicable code or standard of practice developed by a nationally recognized association or independent testing laboratory. The use of metal swing joints in a pressurized UST piping system is specifically prohibited.

(C) If buried and in contact with soil or backfill materials, all metallic pipe, valves, and fittings (including flexible connectors) shall be equipped with corrosion protection meeting the applicable requirements in §334.49 of this title.

(D) Only UL-listed (or agency accepted equivalent listing by Underwriters' Laboratories of Canada (ULC), or Factory Mutual Research Corporation (FMRC)) flexible connectors or nonmetallic piping listed for aboveground use or listed for use in sumps can be used without backfill cover in sumps, manways, or dispenser pans.

(d) Secondary containment for UST systems.

(1) Applicability.

(A) A secondary containment system meeting the requirements of this subsection shall be installed as part of any hazardous substance UST system, in accordance with the applicable schedules in §334.44(a)(2) and (b)(2) of this title (relating to Implementation Schedules).

(B) A double-wall tank and piping system (or approved alternative) meeting the applicable requirements of this subchapter shall be installed for any UST system situated in the Edwards Aquifer recharge or transition zones, in accordance with Chapter 213 of this title (relating to Edwards Aquifer).

(C) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(D) The agency may specifically require the installation of a secondary containment system meeting the requirements of this subsection at other times when necessary for the protection of human health or safety or the environment.

(E) Requirements applicable to new tanks, lines and/or dispensers (including related sumps or manways) installed on or after January 1, 2009:

(i) Any new tank or line installed as part of a UST system must incorporate secondary containment in accordance with the applicable requirements of this subchapter, except that external liners will not be allowed as a secondary containment method.

(ii) Up to 35% [20%] of the total original length of an existing single wall line can be replaced with new single wall line in accordance with the applicable requirements of this subchapter without triggering the secondary containment requirement for that line, unless the new line segment connects the existing line to a new dispenser. If more than 35% [20%] of the total original length of an existing single wall line is to be replaced, or the new line segment connects the existing line to a new dispenser, that line segment must be replaced [~~in its entirety~~] with a line [~~one~~] which incorporates secondary containment.

(iii) The interstice of the secondarily contained tank and/or line must be monitored in accordance with the requirements of §334.50(d)(7) of this title.

(iv) Any sumps or manways included in a new secondarily contained UST system which are utilized as an integral part of a UST release detection system to monitor the interstitial space of a new secondarily contained piping system must be compatible with the stored substance(s), must be installed and maintained in a manner that assures that their sides, bottoms, and any penetration points are liquid tight, and must be inspected for tightness annually and tested for tightness immediately after installation and at least once every three years thereafter.

(v) Under-dispenser containment in the form of a dispenser sump is required for any new dispenser. A new dispenser is defined as:

(I) any dispenser which is installed where none previously existed; or

(II) any existing dispenser which is removed and replaced with another dispenser and transitional piping components beneath the replacement dispenser (e.g., flexible connectors or piping risers) which serve to connect the dispenser to the underground piping are replaced. Each new dispenser must employ a dispenser sump which is compatible with the stored substance, is installed and maintained in a manner that assures that its sides, bottoms, and any penetration points are liquid tight, and must be inspected for tightness annually and tested for tightness, immediately after installation and at least once every three years thereafter.

(vi) Any sumps or manways included in a new secondarily contained UST system which are utilized as an integral part of a UST release detection system to monitor the interstitial space of a new secondarily contained piping system, and any new dispenser sumps [All sumps (including dispenser sumps) and/or manways] must be equipped with a liquid sensing probe(s) [probe/s] which will alert the UST system owner or operator if more than two inches of liquid collects in any sump or manway.

(vii) Liquids and/or debris found in any sumps or manways which are included in a new secondarily contained UST system and utilized as an integral part of a UST release detection system to monitor the interstitial space of a new secondarily contained piping system, and/or in any new dispenser sumps must be removed and properly disposed of within 96 [72] hours of alert or discovery.

(viii) Inspections and testing:

(I) Inspections must be performed by a qualified person who is competent to conduct the inspection in accordance with recognized industry practices and in accordance with industry standards, if applicable.

(II) Testing of tanks and/or lines shall be performed in accordance with the applicable requirements of this chapter. Testing of sumps or manways (including dispenser sumps) must be performed by a qualified person who is competent to conduct the inspection in accordance with recognized industry practices and in accordance with industry standards, if applicable.

(2) General performance standards. All secondary containment systems installed as part of a UST system shall be:

(A) designed, installed, and operated in a manner that will prevent the release of regulated substances from such secondary containment system into the surrounding soil, backfill, groundwater, or surface water during the operational life of the UST system;

(B) capable of collecting and containing releases of regulated substances from any portion of the primary containment vessels (e.g., tanks and piping) until such released substances are removed;

(C) constructed of or lined with materials which are compatible with the stored regulated substance;

(D) constructed of materials having sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrological forces), physical contact with the stored regulated substance (and any other substance to which they may normally be exposed), climatic conditions, the stresses of installation, and the stresses of daily operation (including stresses from nearby vehicular traffic); and

(E) installed on a properly designed and properly placed bedding or backfill material which is capable of providing adequate support for the secondary containment system, capable of providing adequate resistance to any pressure gradients above and below the system, and capable of preventing failure due to settlement, compression, or uplift.

(3) Secondary containment for tanks. One or more of the following methods may be used to provide secondary containment for tanks.

(A) Double-wall tanks. Double-wall tanks may be used to comply with the secondary containment requirements of this subchapter, provided that such tanks shall meet the following additional provisions.

(i) The secondary wall of such double-wall tanks shall be structurally designed to contain and support the full-load capacity of the primary tank without failure.

(ii) The double-wall tank (including both the primary and secondary tank walls) shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The double-wall tank shall be designed, installed, operated, and maintained in accordance with one of the applicable codes or standards of practice listed as follows:

(I) for fiberglass-reinforced plastic tanks: UL Standard 1316, "Standard for Safety for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures."

(II) for steel tanks: STI Standard, "Standard for Dual Wall Underground Steel Storage Tanks," UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids," and other applicable UL standards for double-wall steel tanks; and

(III) any other code or standard of practice developed by a nationally recognized association or independent testing laboratory that has been reviewed and determined by the agency to be no less protective of human health and safety, and the environment than the standards described in subclauses (I) and (II) of this clause, in accordance with procedures in §334.43 of this title.

(iv) The double-wall tank system shall be installed in accordance with the requirements in §334.46(f)(2) of this title.

(B) External liners. Tank excavation liners may be used to comply with the secondary containment requirements of this paragraph, provided that such liners shall meet the following additional provisions.

(i) The tank excavation liner shall consist of an artificially constructed material that is of sufficient strength, thickness, puncture-resistance, and impermeability (i.e., allow permeation at a rate of no more than 0.25 ounces per square foot per 24 hours for the stored regulated substance) in order to permit the collection and containment of any releases from the UST system. The criteria for evaluation of the liner for compliance with this clause shall be in accordance with accepted industry practices for materials testing. Types of liners which may be used include certain reinforced and unreinforced flexible-membrane liners, rigid fiberglass-reinforced plastic liners, and reinforced concrete vaults.

(ii) The liner shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The liner shall be sufficiently compatible with the stored regulated substance, so that any regulated substance collected in the liner system shall not cause any substantial deterioration of the liner that would allow the regulated substances to be released into the environment.

(iv) The liner shall be designed to provide a containment volume of no less than 100% of the full capacity of the largest tank within its containment area.

(v) The liner shall be installed in accordance with the requirements in §334.46(f)(4) of this title.

(4) Secondary containment for piping. One or more of the following methods shall be used to provide secondary containment for piping.

(A) Double-wall piping. Double-wall piping systems may be used to comply with the secondary containment requirements of this subchapter, provided that such piping systems meet the following additional provisions.

(i) The double-wall piping system shall be designed to contain a release from any portion of the primary piping within the secondary piping walls.

(ii) The double-wall piping system (including both the primary and secondary piping) shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The double-wall piping system shall be designed, installed, and operated in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(iv) The double-wall piping system shall be installed in accordance with the requirements in §334.46(f)(3) of this title.

(B) External liners. External piping trench liners may be used to comply with the secondary containment requirements of this paragraph, provided that such liners meet the additional provisions in paragraph (3)(B) of this subsection.

(e) Technical standards for other new UST system equipment.

(1) Vent lines. All underground portions of the vent lines (including all associated underground valves, fittings, and connectors) shall be designed and constructed in accordance with the piping requirements in subsection (c)(1) of this section, shall be properly protected from corrosion in accordance with one of the allowable methods in §334.49 of this title, and shall be installed in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(2) Fill pipes. All fill pipes (including any connected fittings) shall be:

(A) designed and constructed in accordance with the piping requirements in subsection (c)(1) of this section;

(B) properly protected from corrosion in accordance with one of the allowable methods in §334.49 of this title;

(C) properly enclosed in or equipped with spill and overfill prevention equipment as required in §334.51(b) of this title; and

(D) equipped with a removable or permanent factory-constructed drop tube which shall extend to within 12 inches of the tank bottom.

(3) Release detection equipment. All release detection equipment shall be designed and constructed in accordance with the requirements for the particular type of equipment, as described in the applicable provisions in §334.50 of this title.

(4) Monitoring wells and observation wells.

(A) All monitoring wells and observation wells installed on or after the effective date of this subchapter shall be designed, constructed, and installed in accordance with the requirements in §334.46(g) of this title.

(B) Each separate tank hole in a new UST system installed on or after the effective date of this subchapter shall include a minimum number of four-inch diameter (nominal) observation wells, as specified in the following clauses:

(i) for a tank hole containing only one tank, a minimum of one observation well shall be required; and

(ii) for a tank hole containing two or more tanks, a minimum of two observation wells shall be required.

(f) Records for technical standards for new UST systems. Owners and operators of new UST systems shall maintain adequate records to demonstrate compliance with the applicable provisions in this section, which at a minimum, shall include all records required in §334.46(i) of this title. All records shall be maintained in accordance with §334.10(b) of this title (relating to Reporting and Recordkeeping).

§334.49. *Corrosion Protection.*

(a) General requirements.

(1) Owners and operators of underground storage tank (UST) systems (or underground metal UST system components) which are required to be protected from corrosion shall comply with the requirements in this section to ensure that releases due to corrosion are prevented.

(2) All corrosion protection systems shall be designed, installed, operated, and maintained in a manner that will ensure that corrosion protection will be continuously provided to all underground metal components of the UST system.

(3) Any alternative methods for corrosion protection or variances from the requirements of this section are prohibited, except when reviewed and approved by the agency pursuant to procedures for variances found in §334.43 of this title (relating to Variances and Alternative Procedures).

(4) Corrosion protection in accordance with the provisions of this section shall be provided to all underground and/or totally or partially submerged metal components of any existing or new ~~an~~ UST system which are designed or used to convey, contain, or store regulated substances, including, but not limited to, the tanks, piping (including valves, fittings, flexible connectors, swing joints, and impact/shear valves), and also to other underground metal components associated with an UST system, including but not limited to, secondary containment devices, manways, manholes, fill pipes, vent lines, submersible pump housings, spill containers, and riser pipes.

(5) For internal corrosion protection, the interior bottom surface of new metal tanks installed on or after September 29, 1989, shall be fitted with a striker plate under all fill, gauge, and monitoring openings.

(6) When provisions of this subsection require compliance with a specific code or standard of practice developed by a nationally recognized association or independent testing laboratory, the most recent version of the referenced code in effect at the time of the regulated UST activity shall be applicable.

(7) For an UST system to be placed temporarily out of service, the owner or operator must comply with the requirements of §334.54(c) of this title (relating to Temporary Removal from Service).

(b) Allowable corrosion protection methods. All components of an UST system which are designed to convey, contain, or store regulated substances shall be protected from corrosion by one or more of the following methods.

(1) The component may be constructed of a noncorrodible material which is compatible with the stored regulated substance(s).

(2) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by installing the component in an open area (e.g., manway, sump, vault, pit, etc.) where periodic visual inspection of all parts of the component for the presence of corrosion or released substances is practicable.

(3) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by completely enclosing the component in a secondary containment device (e.g., wall, jacket, or liner), provided that:

(A) the secondary containment device is designed and installed in accordance with the applicable technical and installation standards in §334.45(d) of this title (relating to Technical Standards for New Underground Storage Tank Systems) and §334.46(f) of this title (relating to Installation Standards for New Underground Storage Tank Systems), and in accordance with an applicable code or standard of practice developed by a nationally recognized association or independent testing laboratory, and is either:

(i) constructed of a noncorrodible material which is compatible with the stored regulated substance;

(ii) electrically isolated from the protected component and other metallic components; or

(iii) cathodically protected by either a factory-installed or field-installed cathodic protection system meeting the applicable requirements of subsection (c) of this section; and

(B) the interstitial space between the protected component and the secondary containment device shall be free of any soil, backfill material, groundwater or any other water, or other substances, and the protected component shall be regularly inspected and tested for electrical isolation in accordance with the provisions in subsection (d)(1) of this section.

(4) Tanks (only) may be factory-constructed either as a steel/fiberglass-reinforced plastic composite tank, or as a steel tank with a bonded fiberglass-reinforced plastic external cladding or laminate, or as a steel tank with a bonded fiberglass reinforced polyurethane coating, as a steel tank with a bonded polyurethane external coating, or as a steel tank completely contained within a nonmetallic external tank jacket in accordance with the requirements in §334.45(b)(1)(D), (E), or (F) of this title, as applicable.

(5) The component may be coated with a suitable dielectric material, equipped with appropriate dielectric fittings for electrical isolation, and equipped with either:

(A) a factory-installed cathodic protection system meeting the requirements of subsection (c)(1) of this section; or

(B) a field-installed cathodic protection system meeting the requirements of subsection (c)(2) of this section.

(6) Except for the tanks and the piping system components, other underground components of a UST system (including vent lines, fill risers, ~~submersible pump risers and housings,~~ spill containment vessels, and tank fittings (e.g., bunghole plugs)) which do not routinely contain regulated substances may be protected from corrosion by thorough coating or wrapping with a suitable dielectric material which is compatible with the stored regulated substance without the need for the use of other corrosion protection methods.

(7) Corrosion protection in accordance with the requirements of this subchapter is not required if it is determined by a corrosion specialist that corrosion protection of an underground metal UST system or UST system component is unnecessary because the site is not corrosive enough to cause a release due to corrosion for the operational life of the UST system. The upgrade or repair of an existing corrosion protection system for an underground metal UST system or UST system component is not required if it is determined by a corrosion specialist that said upgrading or repair is unnecessary and that the protection provided by the existing corrosion protection system is sufficient to prevent a release due to corrosion for the operational life of the UST system. In either case, the determination of the corrosion specialist must be made in writing, must be signed by the corrosion specialist (corrosion specialist must also seal the written determination if he or she is a qualified duly licensed professional engineer in Texas), and must be maintained by the owner and operator as part of the records for the facility in keeping with the requirements of subsection (e) of this section and §334.10(b) of this title (relating to Reporting and Record-keeping).

(c) Cathodic protection systems.

(1) Factory-installed cathodic protection systems.

(A) A factory-installed cathodic protection system on any UST component shall be designed, fabricated, installed, operated, and maintained in accordance with applicable codes or standards of practice developed for such cathodic protection method by a nationally recognized association or independent testing laboratory.

(B) At a minimum, the factory-installed cathodic protection system shall include the following components:

(i) a suitable dielectric external coating or laminate, which shall thoroughly cover all exterior surfaces exposed to the soil, backfill, or groundwater or any other water, and which shall consist of materials which are compatible with the stored regulated substances;

(ii) dielectric isolation bushings, connections, or fittings, which shall be installed at all locations where the protected component connects to other metallic system components, and which shall be constructed of materials which are compatible with the stored regulated substances; and

(iii) sacrificial anodes which are firmly attached and electrically connected to the protected components and which are positioned and sized to provide complete cathodic protection for all parts of the protected component.

(2) Field-installed cathodic protection systems.

(A) A field-installed cathodic protection system on any UST system component shall be designed by a qualified corrosion specialist, and shall be designed, installed, operated, and maintained in accordance with applicable codes or standards of practice developed for such cathodic protection systems by a nationally recognized association or independent testing laboratory.

(B) Impressed current cathodic protection systems shall be designed and equipped with appropriate equipment or devices capable of indicating the operational status of the system at all times.

(C) In addition to the standard inspection and testing requirements for all cathodic protection systems required in paragraph (4) of this subsection, all impressed current cathodic protection systems shall be regularly inspected by the owner or operator (or the owner's designated representative) to ensure that the rectifier and other system components are operating properly. Such inspections shall be performed at least once every 60 days.

(3) Test stations and connections. To allow for the periodic testing required in paragraph (4) of this subsection, any factory-installed or field-installed cathodic protection system shall include appropriate connections, insulated lead wires, and accessible test stations. All lead wires connected to the tanks, anodes, reference electrodes, and other components associated with the cathodic protection system shall terminate at one or more test stations. The termination of each lead wire at a test station shall be clearly labeled or coded to properly identify the specific component to which it is connected.

(4) Inspection and testing requirements for all cathodic protection systems.

(A) Except as provided in subsection (d)(2) of this section, all cathodic protection systems which are used to provide corrosion protection for any component of a UST system shall be inspected and tested to determine the adequacy of the cathodic protection by a qualified corrosion specialist or corrosion technician in accordance with the requirements in this paragraph.

(B) The inspection and testing criteria used to determine the adequacy of the cathodic protection shall be in accordance with a code or standard of practice developed by a nationally recognized corrosion association or independent testing laboratory.

(C) All cathodic protection systems shall be inspected and tested for operability and adequacy of protection within three to six months after installation and at a subsequent frequency of at least once every three years.

(d) Requirements for other corrosion protection methods.

(1) Electrically isolated components.

(A) Except for jacketed tanks meeting the requirements of §334.45(b)(1)(F) of this title, any metal component of an UST system which is protected from corrosion by one of the electrical isolation methods described in subsection (b)(2) and (3) of this section, and which is not equipped with a cathodic protection system, shall be periodically inspected and tested to ensure that the metal component remains electrically isolated from the surrounding soil, backfill, groundwater or any other water, and from other metal components in accordance with one or more of the following procedures.

(i) When visual inspection is possible, the entire exterior surface of such component may be thoroughly inspected visually by qualified personnel for the presence of corrosion or released regulated substances.

(ii) If visual inspection is not possible, the component may be inspected and tested by a qualified corrosion technician or by a qualified corrosion specialist by taking structure to soil voltage readings in accordance with procedures established by a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(iii) The component may be inspected and/or tested by an alternative method which has been reviewed and determined by the agency to ascertain electrical isolation and to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and safety and the environment

than the methods described in clauses (i) and (ii) of this subparagraph, in accordance with the procedures in §334.43 of this title.

(B) The inspections and tests required in subparagraph (A) of this paragraph shall be conducted within three to six months after installation of the metal component, and then once every three years thereafter for the remaining operational life of the UST system.

(C) If the tests required in subparagraph (A) of this paragraph indicate that the metal component is no longer electrically isolated from the surrounding soil, backfill, groundwater or any other water, or from other metal components, a qualified corrosion specialist shall review the test results and thoroughly inspect the area of the metal component to ascertain the extent of electrical isolation and corrosion protection for the component.

(D) If the qualified corrosion specialist determines that the metal component is no longer adequately protected from corrosion, the owner or operator shall assure that one or more of the following procedures are completed within 60 days of the date of such determination:

(i) appropriate repairs or modifications shall be made to restore the electrical isolation of the protected component; or

(ii) a field-installed cathodic protection system meeting the requirements of subsection (c)(2) of this section shall be installed.

(2) Dual-protected tanks. If a steel/fiberglass-reinforced plastic composite tank, a steel tank with a bonded fiberglass-reinforced plastic external cladding or laminate, a steel tank with a bonded fiberglass reinforced polyurethane coating, or a steel tank with a bonded polyurethane coating is also equipped with a factory-installed cathodic protection system, then the normal inspection and testing requirements for cathodic protection systems in subsection (c)(4) of this section may be waived. This paragraph shall be applicable only to tanks meeting the design and construction requirements in §334.45(b)(1)(D) or (E) [§334.45(b)(1)(E)] of this title, as applicable, and when such tanks are fitted with factory-installed cathodic protection systems meeting the requirements of subsection (c)(1) of this section.

(e) Corrosion protection records.

(1) Owners and operators shall maintain all corrosion protection records required in this subsection in accordance with the requirements in §334.10(b) of this title [~~relating to Reporting and Recordkeeping~~].

(2) Owners and operators shall maintain records adequate to demonstrate compliance with the corrosion protection requirements in this section, and in accordance with the following minimum requirements.

(A) All appropriate installation records related to the corrosion protection system, as listed in §334.46(i) of this title, shall be maintained for as long as the corrosion protection system is used, including:

(i) the name, address, telephone number, and corrosion protection credentials of either the company which designed the factory-installed cathodic protection system or the corrosion specialist who designed the field-installed cathodic protection system, as applicable;

(ii) drawings or plans depicting the locations of all cathodic protection system components, including the locations of all test stations; and

(iii) operating instructions and warranty information, maintenance schedules, and testing procedures for all operational components of the cathodic protection systems.

(B) The following corrosion protection records shall be maintained for at least five years after the applicable test or inspection is conducted:

(i) results of all tests and inspections of any impressed current cathodic protection system conducted in accordance with subsection (c)(2)(C) of this section;

(ii) results of all tests and inspections of the adequacy of any cathodic protection system conducted in accordance with subsection (c)(4) of this section;

(iii) results of all tests and inspections to assure corrosion protection for electrically isolated components in accordance with subsection (d)(1) of this section.

§334.50. Release Detection.

(a) General requirements.

(1) Owners and operators of new and existing underground storage tank (UST) systems shall provide a method, or combination of methods, of release detection which shall be:

(A) capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other underground ancillary equipment;

(B) installed, calibrated, operated, maintained, utilized, and interpreted (as applicable) in accordance with the manufacturer's and/or methodology provider's specifications and instructions consistent with the other requirements of this section, and by personnel possessing the necessary experience, training, and competence to accomplish such requirements; and

(C) capable of meeting the particular performance requirements of such method (or methods) as specifically prescribed in this section, based on the performance claims by the equipment manufacturer or methodology provider/vendor, as verified by third-party evaluation conducted by a qualified independent testing organization, using applicable United States Environmental Protection Agency protocol, provided that the following additional requirements shall also be met.

(i) Any performance claims, together with their bases or methods of determination including the summary portion of the independent third-party evaluation, shall be obtained by the owner and/or operator from the equipment manufacturer, methodology provider, or installer and shall be in writing.

(ii) When any of the following release detection methods are used on or after December 22, 1990 (except for methods permanently installed and in operation prior to that date), such method shall be capable of detecting the particular release rate or quantity specified for that method such that the probability of detection shall be at least 95% and the probability of false alarm shall be no greater than 5.0%:

(I) tank tightness testing, as prescribed in subsection (d)(1)(A) of this section;

(II) automatic tank gauging, as prescribed in subsection (d)(4) of this section;

(III) automatic line leak detectors for piping, as prescribed in subsection (b)(2)(A)(i) of this section;

(IV) piping tightness testing, as prescribed in subsection (b)(2)(A)(ii)(I) of this section;

(V) electronic leak monitoring systems for piping, as prescribed in subsection (b)(2)(A)(ii)(III) of this section; and

(VI) statistical inventory reconciliation (SIR), as prescribed in subsection (d)(9) of this section.

(2) When a release detection method operated in accordance with the particular performance standards for that method indicates that a release either has or may have occurred, the owners and operators shall comply with the applicable release reporting, investigation, and corrective action requirements in Subchapter D of this chapter (relating to Release Reporting and Corrective Action).

(3) Owners and operators of all UST systems shall comply with the release detection requirements of this section in accordance with the applicable schedules in §334.44 of this title (relating to Implementation Schedules).

(4) As prescribed in §334.47(a)(2) of this title (relating to Technical Standards for Existing Underground Storage Tank Systems), any existing UST system that cannot be equipped or monitored with a method of release detection that meets the requirements of this section shall be permanently removed from service in accordance with the applicable procedures in §334.55 of this title (relating to Permanent Removal from Service) no later than 60 days after the implementation date for release detection as prescribed by the applicable schedules in §334.44 of this title.

(5) Any owner or operator who plans to install a release detection method for a UST system shall comply with the applicable construction notification requirements in §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems), and upon completion of the installation of such method shall also comply with the applicable registration and certification requirements of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) and §334.8 of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems).

(6) Any equipment installed or used for conducting release detection for a UST system shall be listed, approved, designed, and operated in accordance with standards developed by a nationally recognized association or independent testing laboratory (e.g., UL) for such installation or use, as specified in §334.42(d) of this title (relating to General Standards).

(7) For a UST system to be placed temporarily out-of-service, the owner or operator must comply with the requirements of §334.54(c) of this title (relating to Temporary Removal from Service).

(b) Release detection requirements for all UST systems. Owners and operators of all UST systems shall ensure that release detection equipment or procedures are provided in accordance with the following requirements.

(1) Release detection requirements for tanks.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph and in subsection (d)(9) of this section, all tanks shall be monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods described in subsection (d)(4) - (10) of this section).

(B) A combination of tank tightness testing and inventory control in accordance with subsection (d)(1) of this section may be used as an acceptable release detection method for tanks only until December 22, 1998, and the required frequency of the tank tightness test shall be based on the following criteria.

(i) A tank tightness test shall be conducted at least once each year for any tank in an existing UST system which is not being operated in violation of the upgrading or replacement schedule in §334.44(b) of this title, but has not yet been either:

(I) replaced with a UST system meeting the applicable technical and installation standards in §334.45 of this title (relating to Technical Standards for New Underground Storage Tank Systems) and §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems); or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(ii) A tank tightness test shall be conducted at least once every five years for any tank in a UST system which has been either:

(I) installed in accordance with the applicable technical standards for new UST systems in §334.45 and §334.46 of this title; or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(C) The manual tank gauging method of release detection, as prescribed in subsection (d)(2) of this section, may be used as the sole release detection system only for a petroleum substance tank with a nominal capacity of 1,000 gallons or less. The monthly tank gauging method of release detection, as prescribed in subsection (d)(3) of this section, may be used as the sole release detection system only for emergency generator tanks.

(D) In addition to the requirements in subparagraphs (A) - (C) of this paragraph, any tank in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(2) Release detection for piping. Piping in a UST system shall be monitored in a manner which will detect a release from any portion of the piping system, in accordance with the following requirements.

(A) Requirements for pressurized piping. UST system piping that conveys regulated substances under pressure shall be in compliance with the following requirements.

(i) Each separate pressurized line (except for lines utilized in airport hydrant systems) shall be equipped with an automatic line leak detector meeting the following requirements.

(I) The line leak detector shall be capable of detecting any release from the piping system of three gallons per hour when the piping pressure is at ten pounds per square inch.

(II) The line leak detector shall be capable of alerting the UST system operator of any release within one hour of occurrence either by shutting off the flow of regulated substances, or by substantially restricting the flow of regulated substances.

(III) The line leak detector shall be tested at least once per year for performance and operational reliability and shall be properly calibrated and maintained, in accordance with the manufacturer's specifications and recommended procedures.

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall

also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) Except as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(III) The piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by means of an electronic leak monitoring system capable of detecting any release from the piping system of 0.2 gallons per hour at normal operating pressure.

(B) Requirements for suction piping and gravity flow piping.

(i) Except as provided in clause (ii) of this subparagraph, each separate line in a UST piping system that conveys regulated substances either under suction or by gravity flow shall meet at least one of the following requirements.

(I) Each separate line may be tested at least once every three years by means of a positive or negative pressure tightness test applicable to underground product piping and conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping test shall be capable of detecting any release from the piping system of 0.1 gallons per hour.

(II) Each line may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(ii) No release detection methods are required to be installed or applied for any piping system that conveys regulated substances under suction when such suction piping system is designed and constructed in accordance with the following standards:

(I) the below-grade piping operates at less than atmospheric pressure;

(II) the below-grade piping is sloped so that all the contents of the pipe will drain back into the storage tank if the suction is released;

(III) only one check valve is included in each suction line;

(IV) the check valve is located aboveground, directly below and as close as practical to the suction pump; and

(V) verification that the requirements under subclauses (I) - (IV) of this clause have been met can be provided in the form of:

(-a-) signed as-built drawings or plans provided by the installer or by a professional engineer who is duly licensed to practice in Texas; or

(-b-) signed written documentation provided by a UST contractor who is properly registered with the agency, by a

UST installer who is properly licensed with the agency, or by a professional engineer who is duly licensed to practice in Texas.

(C) Monitoring secondary containment. In addition to the requirements in subparagraphs (A) and (B) of this paragraph, all piping in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(c) Additional release detection requirements for hazardous substance UST systems. In addition to the release detection requirements for all UST systems prescribed in subsections (a) and (b) of this section, owners and operators of all hazardous substance UST systems shall also assure compliance with the following additional requirements.

(1) All new hazardous substance UST systems shall be in compliance with the requirements of paragraph (3) of this subsection for the entire operational life of the system.

(2) All existing hazardous substance UST systems shall be brought into compliance with the requirements of paragraph (3) of this subsection no later than December 22, 1998.

(3) Secondary containment and monitoring.

(A) All hazardous substance UST systems (including tanks and piping) shall be equipped with a secondary containment system which shall be designed, constructed, installed, and maintained in accordance with §334.45(d) and §334.46(f) of this title.

(B) All hazardous substance UST systems (including tanks and piping) shall include one or more of the release detection methods or equipment prescribed in subsection (d)(7) - (10) of this section, which shall be capable of monitoring the space between the primary tank and piping walls and the secondary containment wall or barrier.

(d) Allowable methods of release detection. Tanks in a UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) Tank tightness testing and inventory control. A combination of tank tightness testing and inventory control may be used as a tank release detection method only until December 22, 1998, subject to the following conditions and requirements.

(A) Tank tightness test. Any tank tightness test shall be conducted in conformance with the following standards.

(i) The tank tightness test shall be conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) The tank tightness test shall be performed by qualified personnel who possess the requisite experience, training, and competence to conduct the test properly, who are present at the facility and who maintain responsible oversight throughout the entire testing procedure, and who have been certified by the manufacturer or developer of the testing equipment as being qualified to perform the test. The tank tightness test shall be conducted in strict accordance with the testing procedures developed by the system manufacturer or developer.

(iii) The tank tightness test shall be capable of detecting a release of 0.1 gallons per hour from any portion of the tank which contains regulated substances.

(iv) The tank tightness test shall be performed in a manner that will account for the effects of vapor pockets, thermal expansion or contraction of the stored substance, temperature of the stored substance, temperature stratification, evaporation or condensation, groundwater elevation, pressure variations within the system, tank end deflection, tank deformation, and any other factors that could affect the accuracy of the test procedures.

(B) Inventory control. All inventory control procedures shall be in conformance with the following requirements.

(i) All inventory control procedures shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) Reconciliation of detailed inventory control records shall be conducted at least once each month, and shall be sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons.

(iii) The operator shall assure that the following additional procedures and requirements are followed.

(I) Inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank shall be recorded each operating day.

(II) The equipment used shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(III) Substance dispensing shall be metered and recorded within an accuracy of six or less cubic inches for every five gallons of product withdrawn.

(IV) The measurement of any water level in the bottom of the tank shall be made to the nearest 1/8 inch at least once a month, and appropriate adjustments to the inventory records shall be made.

(2) Manual tank gauging. Manual tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Manual tank gauging in accordance with this subparagraph may be used as the sole method of tank release detection only for petroleum substance tanks having a nominal capacity of 1,000 gallons or less.

(B) The use of manual tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks with a nominal capacity greater than 1,000 gallons.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this subparagraph only, the following definitions are applicable.

(I) Level measurement--The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other measuring equipment.

(II) Gauging period--A weekly period during which no substance is added to or removed from the tank. The duration

of the gauging period is dependant upon tank volume and diameter, as specified in clause (v) of this subparagraph.

(III) Weekly deviation--The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(IV) Monthly deviation--The arithmetic average of four consecutive weekly deviations, expressed as gallons.

(ii) Any measuring equipment shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken weekly at the beginning and the ending of the gauging period, and the weekly deviation shall be determined from such level measurements.

(iv) Once each month, after four consecutive weekly deviations are determined, a monthly deviation shall be calculated.

(v) For the purposes of the manual tank gauging method of release detection, a release shall be indicated when either the weekly deviation or the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less (any tank diameter): minimum duration of gauging period = 36 hours; weekly standard = ten gallons; monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 64 inches): minimum duration of gauging period = 44 hours; weekly standard = nine gallons; monthly standard = four gallons;

(III) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 48 inches): minimum duration of gauging period = 58 hours; weekly standard = 12 gallons; monthly standard = six gallons.

(vi) When either the weekly standard or the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(3) Monthly tank gauging. Monthly tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Monthly tank gauging in accordance with this paragraph may be used as the sole method of tank release detection only for emergency generator tanks.

(B) The use of monthly tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks other than emergency generator tanks.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this paragraph only, the following definitions are applicable.

(I) Level measurement--The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other manual or automatic measuring equipment.

(II) Gauging period--A period of at least 36 hours during which no substance is added to or removed from the tank.

(III) Monthly deviation--The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(ii) Any measuring equipment (whether operated manually or automatically) shall be capable of measuring the level of a stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken at least once monthly at the beginning and the ending of the gauging period, and the monthly deviation shall be determined from such level measurements.

(iv) For the purposes of the monthly tank gauging method of release detection, a release shall be indicated when the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less: monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons: monthly standard = seven gallons;

(III) for a tank with a capacity of 1,001 gallons to 2,000 gallons: monthly standard = 13 gallons;

(IV) for a tank with a capacity greater than 2,000 gallons: monthly standard = 1.0% of the total tank capacity.

(v) When the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(4) Automatic tank gauging and inventory control.

(A) A combination of automatic tank gauging and inventory control may be used as a tank release detection method, subject to the following requirements.

(i) Inventory control procedures shall be in compliance with paragraph (1)(B) of this subsection.

(ii) The automatic tank gauging equipment shall be capable of:

(I) automatically monitoring the in-tank liquid levels, conducting automatic tests for substance loss, and collecting data for inventory control purposes; and

(II) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(B) For emergency generator tanks only, automatic tank gauging may be used as a tank release detection method, provided that the automatic tank gauging equipment shall be capable of:

(i) automatically monitoring the in-tank liquid levels;

(ii) conducting continuous automatic tests for substance loss during the periods when the emergency generator engine is not in operation; and

(iii) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(5) Vapor monitoring. Equipment and procedures designed to test or monitor for the presence of vapors from the regulated substance (or from a related tracer substance) in the soil gas of the back-

filled excavation zone may be used, subject to the following limitations and requirements.

(A) The bedding and backfill materials in the excavation zone shall be sufficiently porous to allow vapors from any released regulated substance (or related tracer substance) to rapidly diffuse through the excavation zone (e.g., gravel, sand, crushed rock).

(B) The stored regulated substance, or any tracer substance placed in the tank system, shall be sufficiently volatile so that, in the event of a substance release from the UST system, vapors will develop to a level that can be readily detected by the monitoring devices located in the excavation zone.

(C) The capability of the monitoring device to detect vapors from the stored regulated substance shall not be adversely affected by the presence of any groundwater, rainfall, and/or soil moisture in a manner that would allow a release to remain undetected for more than one month (not to exceed 35 days).

(D) Any preexisting background contamination in the excavation zone shall not interfere with the capability of the vapor monitoring equipment to detect releases from the UST system.

(E) The vapor monitoring equipment shall be designed to detect vapors from either the stored regulated substance, a component or components of the stored substance, or a tracer substance placed in the UST system, and shall be capable of detecting any significant increase in vapor concentration above preexisting background levels.

(F) Prior to installation of any vapor monitoring equipment, the site of the UST system (within the excavation zone) shall be assessed by qualified personnel to:

(i) ensure that the requirements in subparagraphs (A) - (D) of this paragraph have been met; and

(ii) determine the appropriate number and positioning of any monitor wells and/or observation wells, so that releases into the excavation zone from any part of the UST system can be detected within one month of the release (not to exceed 35 days).

(G) All monitoring wells and observation wells shall be designed and installed in accordance with the requirements of §334.46(g) of this title.

(6) Groundwater monitoring. Equipment or procedures designed to test or monitor for the presence of regulated substances floating on, or dissolved in, the groundwater in the excavation zone may be used, subject to the following limitations and requirements.

(A) The stored regulated substance shall be immiscible in water and shall have a specific gravity of less than one.

(B) The natural groundwater level shall never be more than 20 feet (vertically) from the ground surface, and the hydraulic conductivity of the soils or backfill between all parts of the UST system and the monitoring points shall not be less than 0.01 centimeters per second (i.e., the soils or backfill shall consist of gravels, coarse to medium sands, or other similarly permeable material).

(C) Any automatic monitoring devices that are employed shall be capable of detecting the presence of at least 1/8 inch of free product on top of the groundwater in the monitoring well or observation well. Any manual monitoring method shall be capable of detecting a visible sheen or other accumulation of regulated substances in, on, the groundwater in the monitoring well or observation well.

(D) Any preexisting background contamination in the monitored zone shall not interfere with the capability of the groundwater monitoring equipment or methodology to detect releases from the

UST system, and the groundwater monitoring equipment or methodology shall be capable of detecting any significant increase above preexisting background levels in the amount of regulated substance floating on, or dissolved in, the groundwater.

(E) Prior to installation of any groundwater monitoring equipment, the site of the UST system (within and immediately below the excavation zone) shall be assessed by qualified personnel to:

(i) ensure compliance with the requirements of subparagraphs (A) and (B) of this paragraph; and

(ii) determine the appropriate number and positioning of any monitoring wells and/or observation wells, so that releases from any part of the UST system can be detected within one month (not to exceed 35 days) of the release.

(F) All monitoring wells and observation wells shall be designed, installed, and maintained in accordance with the requirements in §334.46(g) of this title.

(7) Interstitial monitoring for double-wall or jacketed UST systems. Equipment designed to test or monitor for the presence of regulated substance vapors or liquids in the interstitial space between the inner (primary) and outer (secondary) walls of a double-wall or jacketed UST system may be used, subject to the following conditions and requirements.

(A) Any double-wall UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substances from any portion of the primary tank or piping within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be capable of detecting a breach or failure in the primary wall and the entrance of groundwater or any other water into the interstitial space due to a breach in the secondary wall of the double-wall or jacketed tank or piping system within one month (not to exceed 35 days) of such breach or failure (whether or not a stored regulated substance has been released into the environment).

(8) Monitoring of UST systems with secondary containment barriers. Equipment designed to test or monitor for the presence of regulated substances (liquids or vapors) in the excavation zone between the UST system and an impermeable secondary containment barrier immediately around the UST system may be used, subject to the following conditions and requirements.

(A) Any secondary containment barrier or liner system at a UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substance from any portion of the UST system into the excavation zone between the UST system and the secondary containment barrier within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be designed and installed in a manner that will ensure that groundwater, soil moisture, and rainfall will not render the method inoperative where a release could remain undetected for more than one month (not to exceed 35 days).

(D) Prior to installation of any secondary containment release monitoring equipment, the site of the UST system shall be assessed by qualified personnel to:

(i) ensure that the secondary containment barrier will be positioned above the groundwater level and outside the designated 25-year flood plain, unless the barrier and the monitoring equipment are designed for use under such conditions; and

(ii) determine the appropriate number and positioning of any observation wells.

(E) All observation wells shall be designed and installed in accordance with the requirements in §334.46(g) of this title.

(9) Statistical inventory reconciliation (SIR) and inventory control.

(A) A combination of SIR and inventory control may be used as a release detection method for UST system tanks and lines, subject to the following requirements.

(i) Inventory control procedures must be in compliance with paragraph (1)(B) of this subsection.

(ii) The SIR methodology as utilized by its provider or vendor, or by its vendor-authorized franchisee or licensee or representative must analyze inventory control records in a manner which can detect a release of 0.2 gallons per hour from any part of the UST system.

(iii) The UST system owner and/or operator must take appropriate steps to assure that they receive a monthly analysis report from the entity which actually performs the SIR analysis (either the SIR provider/vendor or the provider/vendor-authorized franchisee or licensee or representative) in no more than 15 calendar days following the last day of the calendar month for which the analysis is performed. This analysis report must, at minimum:

(I) state the name of the SIR provider/vendor and the name and version of the SIR methodology which was utilized for the analysis as they are listed in the independent third-party evaluation of that methodology;

(II) state the name of the company and the individual (or the name of the individual if no company affiliation) who performed the analysis, if it was performed by a provider/vendor-authorized franchisee or licensee or representative;

(III) state the name and address of the facility at which analysis is performed and provide a description of each UST system for which analysis has been performed;

(IV) quantitatively state in gallons per hour for each UST system being monitored: the leak threshold for the month analyzed, and the minimum detectable leak rate for the month analyzed, and the indicated leak rate for the month analyzed;

(V) qualitatively state one of the following for each UST system being monitored: "pass," or "fail," or "inconclusive."

(iv) Any UST system analysis report result other than "pass" must be reported to the agency by the UST system owner or operator as a suspected release in accordance with §334.72 of this title (relating to Reporting of Suspected Releases).

(v) Any UST system analysis report result of "inconclusive" which has not been investigated and quantified as a "pass" (in the form of a replacement UST system analysis report meeting the requirements of clause (iii) of this subparagraph) must be reported to the agency as a suspected release within 72 hours of the time of receipt

of the inconclusive analysis report result by the UST system owner or operator.

(B) At least once per calendar quarter, the SIR provider/vendor must select at random, at least one of the individual UST system analyses performed by each of its authorized franchisees or licensees or representatives during that period and audit that analysis to assure that provider/vendor standards are being maintained with regard to the acceptability of inventory control record data, the acceptability of analysis procedures, and the accuracy of analysis results. The written result of that audit must be provided to the authorized franchisee or licensee or representative and to the owner and/or operator of the audited UST system(s) by the SIR provider/vendor during that calendar quarter. In addition, within 30 days following each calendar quarter, the SIR provider/vendor must provide to the agency a list containing the name and address of each of its authorized franchisees or licensees or representatives which specifies for each one, the name and address of each facility at which one or more UST system audits were performed during the previous calendar quarter.

(10) Alternative release detection method. Any other release detection method, or combination of methods, may be used if such method has been reviewed and determined by the agency to be capable of detecting a release from any portion of the UST system in a manner that is no less protective of human health and safety and the environment than the methods described in paragraphs (1) - (8) of this subsection, in accordance with the provisions of §334.43 of this title (relating to Variances and Alternative Procedures).

(e) Release detection records.

(1) Owners and operators shall maintain the release detection records required in this subsection in accordance with the requirements in §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) Owners and operators shall maintain records adequate to demonstrate compliance with the release detection requirements in this section, and in accordance with the following minimum requirements.

(A) All appropriate installation records related to the release detection system, as listed in §334.46(i) of this title, shall be maintained for as long as the release detection system is used.

(B) All written performance claims pertaining to any release detection system used, and documentation of the manner in which such claims have been justified, verified, or tested by the equipment manufacturer, methodology provider/vendor, or independent third-party evaluator shall be maintained for as long as the release detection system is used.

(C) Records of the results of all manual and/or automatic methods of sampling, testing, or monitoring for releases (including tank tightness tests) shall be maintained for at least five years after the sampling, testing, or monitoring is conducted.

(D) Records and calculations related to inventory control reconciliation shall be maintained for at least five years from the date of reconciliation.

(E) Written documentation of all service, calibration, maintenance, and repair of release detection equipment permanently located on-site shall be maintained for at least five years after the work is completed. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer shall be retained for as long as the release detection system is used.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kathleen Decker

Director, Litigation Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2548



SUBCHAPTER N. OPERATOR TRAINING

30 TAC §§334.601 - 334.606

STATUTORY AUTHORITY

The new rules are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which requires the commission to establish and approve, by rule, all general policy of the commission; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; TWC, §26.121, which prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause, pollution of any of the water in the state. The new rules are also proposed under TWC, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks; TWC, §26.3475, which requires underground storage tank systems to comply with commission requirements for tank release detection equipment and spill and overfill equipment; TWC, §26.348, which directs the commission to adopt standards of performance for maintaining leak detection systems; and the federal Energy Policy Act of 2005, (Pub.L. 109-58, August 8, 2005, 119 Stat. 294, codified at 42 United States Code 15801), (Energy Act), which requires states with authorized underground storage tank programs to implement operator training requirements.

The proposed new sections implement TWC, §§26.345, 26.3475, and 26.348. The proposed new sections also implement the portions of the Energy Act dealing with secondary

containment of underground storage tank systems and underground storage tank operator training.

§334.601. Purpose and Applicability.

(a) This subchapter establishes training requirements for different classes of underground storage tank (UST) facility operators to enhance the protection of the state's groundwater and surface water resources from environmental contamination that could result from any releases of harmful substances stored in such systems, and to minimize threats to human health and safety which could result from the improper operation of a UST facility.

(b) Owners and operators of regulated UST systems must comply with the operator training requirements listed in this subchapter.

§334.602. Designation and Training of Classes of Operators.

(a) Owners or operators shall identify and designate for each underground storage tank (UST) facility including unmanned facilities, at least one named individual for each class of operator - Class A, Class B, and Class C. All individuals designated as a Class A, B or C operator shall, at a minimum, be trained and certified in accordance with this subchapter. For the purposes of this subchapter, the terms "Class A Operator", "Class B Operator", "Class C Operator", "Certified Operator" or "Designated Operator" are terms specific to the training requirements of this subchapter. The term "operator" used without these descriptors is the same as the term "operator" used in Chapter 334 generally and as specifically defined in §334.2(70) of this title (relating to Definitions).

(1) Owners and operators may designate different individuals for each class of operator, or one individual for more than one of the operator classes.

(2) Any individual designated for more than one operator class shall be trained and certified for each operator class, except that training and certification as a Class B operator also entitles that individual to certification as a Class A operator.

(3) An individual may be designated as a Class A Operator for one or more facilities. An individual may be designated as a Class B Operator for one or more, but not to exceed 30 facilities. An individual Class C operator must be specifically trained for each facility.

(4) During hours of operation, UST facilities must have at least one certified operator (either a Class A, Class B, or Class C operator) present at the UST facility, except when a UST facility is unmanned. A UST facility is considered unmanned when during the normal course of business there is routinely no attendant present at the facility who could respond to alarms or emergencies related to the UST system. (Examples of unmanned UST facilities include, but are not limited to, card lock or card access fueling stations, telecommunication towers or utility transfer stations serviced by emergency generator USTs, and unattended UST systems located at industrial facilities.) Unmanned facilities must have weather resistant signage clearly visible from any dispenser which instructs users with regard to basic safety procedures, provides the customer with a 24-hour telephone contact number monitored by a Class A, B, or C operator for the facility and provides instruction on when to call 911.

(b) The three classes of operators are identified as follows.

(1) Class A Operator.

(A) Functions. A Class A operator of a UST facility is an individual who typically has primary responsibility for ensuring the proper operation and maintenance of the UST systems, particularly in the capacity of managing resources and personnel necessary to achieve and maintain compliance with all UST regulations.

(B) Qualifications and Training. Class A operators must be trained in and have a general knowledge of the requirements of applicable UST regulations, including, but not limited to registration, system components, product compatibility, spill and overflow prevention, corrosion protection, release detection, recordkeeping, notification, release reporting and response, temporary and permanent closure, operator training, and financial responsibility.

(2) Class B Operator.

(A) Functions. A Class B operator of a UST facility is an individual who ensures the implementation of all applicable requirements of these regulations in the field and to implement the day-to-day aspects of the operation and maintenance of, and recordkeeping for, UST systems.

(B) Qualifications and Training. Class B operators must be trained in and have detailed knowledge of the requirements of applicable UST regulations, including, but not limited to registration, system components, product compatibility, spill and overflow prevention, corrosion protection, release detection, recordkeeping, notification, release reporting and response, temporary and permanent closure, operator training and financial responsibility.

(3) Class C Operator.

(A) Function. A Class C operator of a UST facility is a person designated by the UST system owner who typically controls the dispensing of fuel at the facility and is responsible for initial response to alarms, releases, spills, overfills or threats to the public or to the environment.

(B) Training. Class C operators must be trained in both general and facility-specific emergency response procedures, such as: the operation of emergency shut-off equipment; the initial response procedures following system alarm warnings; the appropriate first response actions to releases, spills, or overfills; and the notification procedures to emergency responders and to the designated Class A and Class B operators of a UST facility.

§334.603. Acceptable Operator Training and Certification Processes.

(a) Training. Operator training must fulfill the training requirements described for each class of operator in §334.602 of this title (relating to Designation and Training of Classes of Operators). The following is a list of acceptable approaches to meet the operator training requirements.

(1) Acceptable Training for Class A and Class B operators. Class A and Class B operators must complete a Texas Commission on Environmental Quality (TCEQ) approved operator training course or process that includes the information listed in §334.602(b)(1) or (2) of this title, respectively. Courses or processes may include in-person or on-line training performed, contracted for, or approved by the TCEQ, and must include an evaluation of operator knowledge through testing, practical demonstration, or other tools deemed acceptable by the TCEQ. In order to be approved by the agency, the provider of a training course or process must be sponsored by an association or industry organization recognized nationwide or statewide with regard to its affiliation with regulated petroleum underground storage tank (UST) systems. Providers will also be required to provide training documentation, including on-going maintenance of records of certified operators. Those records will be required to be accessible to the agency on an on-going basis.

(2) Acceptable Training for Class C Operators.

(A) Class B operators must provide training or ensure that the UST facility's Class C operators otherwise complete train-

ing in emergency procedures that includes the information listed in §334.602(b)(3) of this title. Class C operator training programs may include in-class, hands-on, on-line, or any other training format deemed acceptable by the Class B operator.

(B) Class A and Class B operators must ensure that site-specific notices that include site-specific emergency procedures, the location of emergency shut-off devices, and appropriate emergency contact telephone numbers are posted in a prominent area at the UST facility that is easily visible to the Class C operator.

(b) Certification. Operators are considered certified operators after successfully completing one of the training processes listed in subsection (a) of this section.

(1) Class A and Class B Operators. Approved training providers must provide verification to all Class A and Class B operators who have successfully completed training, in the form of a written or printable electronic training certificate stating the classification and the date it was obtained. Owners and operators must ensure that training certificates are maintained at each facility, with copies of initial or new certificates provided to the TCEQ at the time that annual self certification is required for that facility.

(2) Class C Operators. A designated Class B operator for a given facility must provide the facility owner or operator with signed and dated written verification in the form of a list of all Class C operators who have been trained for that facility, which includes the date of that training. Owners and operators must ensure that a current and correct list of trained Class C operators is maintained at each facility.

§334.604. Operator Training Deadlines.

(a) No later than August 8, 2012, owners or operators of underground storage tank (UST) facilities must designate at least one Class A, Class B, and Class C operator for each facility who has completed an acceptable operator training course as specified in §334.603 of this title (relating to Acceptable Operator Training and Certification Processes).

(b) Class A or Class B operators designated by a UST facility owner or operator after August 8, 2012, must complete an acceptable operator training course as specified in §334.603 of this title, prior to assuming operation and maintenance responsibilities at the UST facility.

(c) Class C operators designated by a UST facility owner or operator after August 8, 2012, must complete an acceptable operator training course as specified in §334.603 of this title, prior to assuming unsupervised responsibility for responding to emergencies at UST system facilities.

§334.605. Operator Training Frequency.

(a) Certified Class A and Class B Operators must be re-trained in accordance with §334.602 and §334.603 of this title (relating to Designation and Training of Classes of Operators; and Acceptable Operator Training and Certification Processes, respectively) within three years of their last training date.

(b) Certified Class C operators must be re-trained in accordance with §334.602 and §334.603 of this title within three years of their last training date. In addition, Class C operator training is only applicable at the specific facility for which the training was provided.

(c) If an underground storage tank (UST) facility receives a notice of violation and the agency determines that the UST facility is in substantial noncompliance, the designated Class B operators for that UST facility, must attend either a Texas Commission on Environmental Quality (TCEQ) approved compliance class that addresses the noted

noncompliant areas or an acceptable operator training course as specified in §334.603 of this title, within the time frame specified by the TCEQ for that violation. (For the purposes of this subchapter, "substantial noncompliance" is defined as the complete failure to provide one or more of the following in accordance with applicable rule: release detection, spill/overfill prevention, corrosion protection or financial assurance.)

§334.606. Documentation of Operator Training.

Owners and operators of underground storage tank facilities (except unmanned facilities) must maintain required training certification documentation as described in §334.603(b) of this title (relating to Acceptable Operator Training and Certification Processes) on-site and must provide it upon request to a Texas Commission on Environmental Quality (TCEQ) or TCEQ-authorized investigator. Documentation may be maintained electronically off-site if that facility has the capability of producing a clear printed copy on site which can be provided to a TCEQ or TCEQ-authorized investigator at the time of the investigation. Owners and operators of unmanned facilities must provide documentation as requested by a TCEQ investigator or TCEQ-authorized investigator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201005389

Kathleen Decker

Director, Litigation Division

Texas Commission on Environmental Quality

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 517. FINANCIAL ASSISTANCE SUBCHAPTER B. COST-SHARE ASSISTANCE FOR BRUSH CONTROL

31 TAC §517.33

The Texas State Soil and Water Conservation Board (State Board or agency) proposes amendments to §517.33, Contracts for Cost-share, to specify that follow-up brush control will now be required to be carried out as agreed to in an eligible person's brush control plan.

The State Board proposes to amend 31 TAC §517.33 by deleting language that currently specifies brush control follow-up is subject to funding availability and inserting new language to state that brush control follow-up will be carried out as agreed to in an eligible person's brush control plan with the agency.

Kenny Zajicek, Fiscal Officer for the State Board, has determined that for the first five-year period there will be no fiscal implications

for state or local government as a result of administering the amended rule.

Mr. Zajicek has also determined that for the first five-year period the amendments are in effect, the public benefit anticipated as a result of administering the amended rule will be effective follow-up management of brush control work contracted with the state.

There is no anticipated cost to small businesses resulting from the amendments. The anticipated cost to eligible individuals contracting with the program will be contingent upon their land management following the initial brush control work.

Comments on the proposed amendments may be submitted in writing to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, (254) 773-2250, x231.

The amendments are proposed under the Texas Agriculture Code, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Texas Agriculture Code and Chapter 203, §203.012, which authorizes the agency to adopt reasonable rules that are necessary to carry out the provisions of that chapter.

No other statutes, articles, or codes are affected by this proposal.

§517.33. Contracts for Cost-share.

(a) According to the priority of an application, the SWCD shall negotiate a ten-year brush control contract with the successful applicant in the brush control area subject to:

(1) - (3) (No change.)

(4) Management of treated areas.

(A) Requirements for follow-up brush control will be included in the cost-share contract with management recommendations outlined in the eligible person's brush control plan. These will be reviewed with the eligible person prior to signature and initiation of the cost-share contract. Requirements for follow-up brush control will be carried out as agreed to in the eligible person's brush control plan [are subject to funding availability].

(B) - (C) (No change.)

(b) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201005437

Mel Davis

Special Projects Coordinator

Texas State Soil and Water Conservation Board

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For further information, please call: (254) 773-2250 x252



WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION **SUBCHAPTER B. NEW SOURCE REVIEW PERMITS**

DIVISION 1. PERMIT APPLICATION

30 TAC §116.118

The Texas Commission on Environmental Quality withdraws the proposed amendment to §116.118 which appeared in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978).

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005395

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Effective date: September 17, 2010

For further information, please call: (512) 239-6090

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS SERVICES DIVISION

SUBCHAPTER D. CUSTOMER SERVICE AND PROTECTION

16 TAC §7.470

The Railroad Commission of Texas (the Commission) adopts new §7.470, relating to Natural Gas Bill Payment by the State or a State Agency, without changes to the version published in the July 9, 2010, issue of the *Texas Register* (35 TexReg 6000). The new rule implements authority delegated to the Commission in Texas Utilities Code, §104.255, as originally enacted in Texas Revised Civil Statutes Annotated, Article 1446e, §10.05 and §10.06, by Senate Bill 83, 73rd Legislature, 1993 (Acts 1993, 73rd Legislature, Chapter 660, §6).

Texas Utilities Code, §104.255(a), prohibits gas utilities and municipally owned utilities from billing or otherwise requiring the state or a state agency or institution to pay for a service before the service is provided. Section 104.255(b) requires the Commission to adopt rules concerning payment of bills by the state or a state agency to a gas utility or to a municipally owned utility and requires that such rules be consistent with Texas Government Code, Chapter 2251. Section 104.255(c) states that gas utilities and municipally owned utilities are not prohibited from entering into an agreement with the state or a state agency to establish a level or average monthly billing plan, so long as such agreement requires quarterly reconciliation.

New §7.470 implements authority delegated to the Commission by Texas Utilities Code, §104.255. In subsection (a) of §7.470, the purpose of the rule is set forth. In subsection (b), relevant terms are defined as having the meanings given in Texas Government Code, Chapter 2251, relating to Payment for Goods and Services, and Texas Utilities Code, §101.003, relating to Definitions. In subsection (c), certain requirements, limitations, and prohibitions are outlined in a manner consistent with Texas Utilities Code, §104.255.

BACKGROUND

A brief, yet essential, review of the history of Texas Utilities Code, §104.255, follows. Section 104.255(b) requires the Commission's rules to be consistent with Texas Government Code, Chapter 2251. Section 2251.003 currently requires the Comptroller of Public Accounts to establish procedures and adopt rules to administer Chapter 2251. The obligations of the Comptroller of Public Accounts outlined in Chapter 2251 were previously assigned to the Texas Building and Procurement

Commission and, before that, to the General Services Commission.

The General Services Commission published proposed rules to administer Chapter 2251 in the May 21, 1999, issue of the *Texas Register* (24 TexReg 3811). The proposed rules in Title 1, Chapter 114, Texas Administrative Code (TAC), included §114.1, relating to Definitions; §114.3, relating to Exceptions to Prompt Pay Process; §114.5, relating to Invoicing Standards; §114.7, relating to Payments; and §114.9, relating to Disputed Payments. The General Services Commission's adoption of these five rules, with changes to the proposed versions, was published in the August 20, 1999, issue of the *Texas Register* (24 TexReg 6467); the adopted rules became effective on August 26, 1999.

Subsequently, the General Services Commission was renamed the Texas Building and Procurement Commission. In the December 5, 2003, issue of the *Texas Register* (28 TexReg 10848), that agency proposed modifications to the rules originally adopted by the General Services Commission to bring them into alignment with then-current statutory requirements and to replace outdated language. The Texas Building and Procurement Commission adopted the rules as proposed, without change, as published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1196); the adopted rules became effective on February 11, 2004.

In 2007, House Bill 3560 (Acts 2007, 80th Legislature, Chapter 937, §1.73) transferred responsibility for administration of Chapter 2251 from the Texas Building and Procurement Commission to the Comptroller of Public Accounts, making the transfer of responsibility effective on September 1, 2007. To that end, the two agencies jointly published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4237) a notice of the transfer of numerous rules, including 1 TAC §§114.1, 114.3, 114.5, 114.7, and 114.9. Once transferred to the Comptroller of Public Accounts, the five rules were renumbered as 34 TAC §20.221 relating to Definitions; §20.223, relating to Exceptions to Prompt Payment Process; §20.225, relating to Invoicing Standards; §20.227, relating to Payments; and §20.229, relating to Disputed Payments. The rules of the Comptroller of Public Accounts reiterate portions of Texas Government Code, Chapter 2251, and augment that chapter where it is silent. The transferred rules became effective on September 1, 2007.

COMMENTS ON THE RULE PROPOSAL

The Commission received two comments from interested persons. Comments from the Texas Pipeline Association (TPA), an industry association representing natural gas pipeline companies, did not indicate whether TPA supports or opposes the adoption of §7.470. TPA's comments included a suggestion that the rule clarify whether it applies to the construction of certain facilities and a request pertaining to the potential for complaints. In addition, the Office of the Attorney General of Texas (OAG), on

behalf of state agencies and institutions of higher education, filed comments suggesting that additional definitions and deposit requirements be included in the rule, and requesting that the Commission clarify, in the adoption preamble, whether the rule creates a statute of limitations on the amount of time available to a government entity to contest an overbilling for natural gas service. The OAG applauded the Commission and its staff for "crafting a rule which is simple and straightforward" and fully supports the addition of §7.470 to the Commission's rules.

Comments on §7.470(a)

The purpose of the rule, to implement Texas Utilities Code, §104.225, is set forth in §7.470(a). The Commission received no comments on subsection (a). The Commission adopts the published version of §7.470(a), without change.

Comments on §7.470(b)

Regarding OAG's suggestion to clarify the definition of state agency, subsection (b) defines certain terms as having the meanings given in Texas Government Code, Chapter 2251, relating to Payment for Goods and Services. The rule defines other terms as having the meanings given in Texas Utilities Code, §101.003, relating to Definitions. Included among the definitions in the proposed rule is the definition of the term "state agency" which, as the OAG points out, is defined differently in the Texas Government Code and the Texas Utilities Code.

Texas Government Code, §2251.001, defines the term "state agency" to mean a board, commission, department, office, or other agency in the executive branch of state government that is created by the constitution or a statute of this state, including a river authority and an institution of higher education as defined by Texas Education Code, §61.003; the legislature or a legislative agency; or the Supreme Court of Texas, the Court of Criminal Appeals of Texas, a court of appeals, a state judicial agency, or the State Bar of Texas. On the other hand, Texas Utilities Code, §101.003(15), defines the term "state agency" to have the meaning assigned by Texas Government Code, §572.002, to the extent the state agency must obtain the approval described by Texas Natural Resources Code, §31.401(a).

Texas Government Code, §572.002(10), defines the term "state agency" to mean a department, commission, board, office, or other agency that is in the executive branch of state government, has authority that is not limited to a geographical portion of the state, and was created by the Texas Constitution or a statute of this state; a university system or an institution of higher education as defined by Texas Education Code, §61.003, other than a public junior college, or a river authority created under the Texas Constitution or a statute of this state. Texas Natural Resources Code, §31.401(a), requires the Texas General Land Office to review and approve any contract entered into by a state agency for the acquisition of an annual average of 100,000 cubic feet per day or more of natural gas used to meet its energy requirements.

Commission response to OAG's comments on §7.470(b)

In comparing the definitions of the term "state agency" in the Texas Government Code and the Texas Utilities Code, the Commission finds that the Texas Government Code definition is broader because it includes state government entities within all three branches of state government: the executive, the legislative, and the judicial. The Texas Utilities Code definition of "state agency" includes only certain entities within the executive branch of state government, excludes public junior colleges,

and applies only to a narrow range of contracts reviewed and approved by the Texas General Land Office.

The Commission recognizes the difference in these definitions pointed out by the OAG. Nevertheless, the Commission adopts the broader definition of "state agency" found in Texas Government Code, §2251.001, for bill payment provisions applicable to a broad range of entities within the executive, legislative, and judicial branches of state government. Moreover, Texas Utilities Code, §104.255(b), requires that the Commission's rule be consistent with Texas Government Code, Chapter 2251. For these reasons, the Commission adopts subsection (b) without change.

Comments on §7.470(c)

TPA commented on subsection (c), which requires the payer and the payee to comply with Texas Government Code, Chapter 2251, and with five referenced rules adopted by the Comptroller of Public Accounts. The Comptroller of Public Accounts adopted the five referenced rules because Texas Government Code, §2251.003, requires that agency to "establish procedures and adopt rules to administer this chapter."

TPA envisioned that, as proposed, §7.470 could result in the Railroad Commission being placed in the position of enforcing a Comptroller of Public Accounts rule, if a complaint were filed at the Railroad Commission. TPA proposed that the rule provision regarding compliance with the Comptroller's requirements be removed from subsection (c) and, instead, placed in the preamble. TPA suggested that placement of the compliance requirement in the preamble would give notice to payers and payees of the compliance requirement but would preclude a complainant from filing a complaint at the Commission on this matter.

Commission response to TPA's comments on §7.470(c)

The Commission disagrees with TPA's comments. The Comptroller of Public Accounts has a broad statutory mandate to adopt rules to administer Texas Government Code, Chapter 2251, pertaining to payments for a wide range of goods and services by the state or a state agency. The Railroad Commission has a narrow statutory mandate in Texas Utilities Code, §104.255, to adopt rules concerning payments by the state or a state agency for natural gas service. The Texas Utilities Code requires that the Commission's rules be consistent with Texas Government Code, Chapter 2251.

The provisions in Texas Utilities Code, §104.255, have been in effect since 1993; the Commission's adoption of §7.470 is simply a formality. Since at least 1993, natural gas customers have had the opportunity to file complaints at the Commission. New §7.470 will neither enhance nor diminish a customer's opportunity to file a complaint at the Commission. Further, the Commission interprets Texas Utilities Code, §104.255, to mean that the Commission's rule must be consistent with Texas Government Code, Chapter 2251, and, therefore, those explicit references to Chapter 2251 and the Comptroller's rules designed to implement Chapter 2251 are required. Finally, the Commission disagrees with TPA's view that a statement in the preamble would adequately implement the Texas Utilities Code requirements. While an adoption preamble is an order of the Commission, the preamble text is not part of the Texas Administrative Code, and is therefore unlikely to give adequate notice to anyone. For these reasons, the Commission adopts subsection (c) without change.

Comments on §7.470(c)(1)

Subsection (c)(1) prohibits a gas utility or a municipally owned utility from billing the state or a state agency for a service before

the service is provided. This provision implements the requirement in Texas Utilities Code, §104.255(a), that a gas utility or a municipally owned utility may not bill or otherwise require the state or a state agency or institution to pay for service before the service is provided. The term "service" is defined in Texas Government Code, §2251.001(7), to mean gas and water utility service.

TPA expressed concern that §7.470(c)(1) could be interpreted to prohibit a gas utility from obtaining pre-construction funding from a state agency for the construction of facilities necessary to provide natural gas service to that state agency. TPA requested the Commission affirm in the adoption preamble that the Commission does not intend through this rule to prohibit payments under funding arrangements necessary for the construction of facilities. As an example, TPA noted that a state university might need line extensions valued at several million dollars to extend gas lines to a power generation facility being built on a campus. TPA represented that such construction costs would normally be funded through a contribution from the state university in advance of the construction.

Commission response to TPA's comments on §7.470(c)(1)

The Commission agrees with TPA that §7.470(c)(1) should not be interpreted to prohibit the payment of pre-construction funds by the state or a state agency for construction of facilities related to the provision of natural gas. Section 7.470 neither prohibits nor endorses the payment of such pre-construction funds. The rule is silent on this matter.

Other comment--Texas Utilities Code, §104.202(a)

The OAG requested that the Commission consider defining in §7.470 the meaning of the phrase "an amount representing a gross receipts assessment, regulatory assessment or similar expense of the utility" as that phrase is used in Texas Utilities Code, §104.202(a). Texas Utilities Code, Chapter 104, pertains to the rates and services of natural gas utilities. Subchapter E of Chapter 104 addresses rates applicable to government entities. Texas Utilities Code, §104.202(a), states that the rates a gas utility or municipally owned utility charges a state agency may not include an amount representing a gross receipts assessment, regulatory assessment, or similar expense of the utility.

Commission response to OAG's comment on Texas Utilities Code, §104.202(a)

The Commission disagrees with OAG's comment and finds that defining the phrase "an amount representing a gross receipts assessment, regulatory assessment or similar expense of the utility" is beyond the scope of the notice of proposed rulemaking in this proceeding. While the Commission agrees with the OAG that both the franchise tax and the miscellaneous gross receipts tax identified in Texas Tax Code, Chapter 182, appear to qualify as a "gross receipts assessment, regulatory assessment or similar expense," as outlined in Texas Utilities Code, §104.202(a), the stated purpose of new §7.470 is to implement the requirements in Texas Utilities Code, §104.255, not §104.202(a). Thus, the Commission adopts §7.470 to mirror, as closely as possible, the requirements of Texas Utilities Code, §104.255.

Other comment--deposit requirements

The OAG requests the Commission consider including in §7.470 an exemption for state agencies from any requirement to provide a deposit to a gas utility.

Commission response to OAG's comment on deposit requirements

The Commission disagrees with OAG's comment, finding that deposit requirements are outside the scope of the notice of proposed rulemaking in this proceeding. The Commission declines to modify the language of the rule as OAG suggested. The Commission suggests that the OAG bring this issue to the forefront in any gas utility application before the Commission where it can be determined whether a state agency is being charged a deposit by a natural gas utility. The Commission agrees with the OAG that, generally, the state or a state agency should not be required to establish its creditworthiness through a deposit.

Deposit requirements are not addressed in Texas Utilities Code, Title 3, or Texas Government Code, Chapter 2251, or the Comptroller's rules referenced in §7.470. Deposit requirements are included in each gas utility's tariff. In addition, the Commission's rule §7.45 of this title (relating to Quality of Service), outlines deposit requirements applicable to residential and small business customers. Even residential and small business customers are exempt from deposit requirements after establishing creditworthiness.

Other comment--statute of limitations

The OAG requested the Commission clarify in the adoption preamble that §7.470 is not intended to create a statute of limitations on the amount of time available to a government entity to contest an over-billing on a natural gas bill.

Commission response to OAG's comment on the statute of limitations

The Commission agrees with the OAG that §7.470 does not create a statute of limitations on the amount of time available to a government entity to contest an over-billing on a natural gas bill. The rule is silent on this matter.

The Commission adopts new §7.470 pursuant to Texas Utilities Code, §104.255, which requires the Commission to adopt rules concerning payment of bills by the state or a state agency.

Texas Utilities Code, §104.255, is affected by the adopted new rule.

Statutory authority: Texas Utilities Code, §104.255.

Cross-reference to statute: Texas Utilities Code, §104.255.

Issued in Austin, Texas, on September 14, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 14, 2010.

TRD-201005354

Mary Ross McDonald

Managing Director

Railroad Commission of Texas

Effective date: October 4, 2010

Proposal publication date: July 9, 2010

For further information, please call: (512) 475-1295

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CHAPTER 15. ALTERNATIVE FUELS RESEARCH AND EDUCATION DIVISION SUBCHAPTER A. GENERAL RULES

16 TAC §15.30

The Railroad Commission of Texas adopts an amendment to 16 TAC §15.30, relating to Propane Alternative Fuels Advisory Committee, without changes to the version published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6417). The adopted amendment to subsection (b) changes the date on which the committee is abolished from October 31, 2010, to October 31, 2014.

The Commission received one comment from the Texas Propane Gas Association (TPGA) supporting the extension of the advisory committee. TPGA also suggested the reinstatement of the LP-gas advisory committee. The Commission thanks TPGA for its support and notes that the rule relating to the LP-gas advisory committee was repealed January 7, 2008.

The amendment is adopted under Texas Natural Resources Code, §113.242, which authorizes the Commission to appoint one or more advisory committees composed of members representing the LP-gas industry and other environmentally beneficial alternative fuels industries, consumers, and other interests to consult with and advise the Commission on opportunities and methods to expand the use of LP-gas and other environmentally beneficial alternative fuels; and under Texas Government Code, §2110.008, which provides that a state agency that has established an advisory committee may designate the date on which the committee will automatically be abolished. The designation must be by rule. The committee may continue in existence after that date only if the agency amends the rule to provide for a different abolishment date.

Texas Natural Resources Code, §113.242, and Texas Government Code, §2110.008, are affected by the adopted amendment.

Statutory authority: Texas Natural Resources Code, §113.242, and Texas Government Code, §2110.008.

Cross-reference to statute: Texas Natural Resources Code, §113.242, and Texas Government Code, §2110.008.

Issued in Austin, Texas, on September 14, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Railroad Commission of Texas

Effective date: October 4, 2010

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new §25.33, relating to the Prompt Payment Act, and §25.482, relating to the Prompt Payment Act, with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2469).

The rules ensure that customers that are "governmental entities" under Texas Government Code §§2251.001 - 2251.055 (Prompt Payment Act or PPA) are billed by electric service providers (ESPs) in compliance with the PPA. The new sections are adopted under Project Number 37981.

A public hearing was not requested.

The commission received initial comments on the rules from the State of Texas (State), Southwestern Public Service Company (SPS), Steering Committee of Cities Served by Oncor (Cities), Alliance for Retail Markets (ARM), and Entergy Texas, Inc. (Entergy). The commission received reply comments from Southwestern Tariff Analyst (STA), Entergy, the State, ARM, and Cities.

Comment Summary

General Need for the New Rule

The State supports addition of the new rules to the commission's substantive rules. The State stated that it has a great deal of experience in resolving billing disputes between agencies and electric service providers and that the most difficult aspect, for both counsel and support staff, is convincing providers that the PPA applies to electric utility and REP bills. The State went on to say that when customer service personnel are replaced, it often must go through the same explanation again to educate the new utility and REP employees. The State stated that the new rules will make this process easier and clearer.

Cities stated that it agrees with many of the commenters that the new rules are unnecessary because the PPA itself establishes the procedure for payments by government entities regardless of whether the proposed rule provides for the application of the PPA. ARM stated that the new §25.482 is unnecessary because the majority of its provisions merely restate in general terms the requirements of the PPA, as they apply to a governmental entity customer's payment for retail electric service under the precedent established in Docket Number 34332. ARM stated that §25.482 simply codifies existing law. ARM stated that adoption of §25.482 is antithetical to the commission's undertakings in other projects to assess whether reasons exist for adopting or re-adopting the commission rules under review, as periodically required by Texas Government Code §2001.039. ARM stated that a rule that requires REPs to follow state laws other than PURA that REPs are already obligated to follow does not add value to the market, particularly when the commission has placed the market on notice in a contested case proceeding that it has concluded those other laws apply in the provision of retail electric service under certain circumstances. ARM stated that §25.482 neither adds to nor detracts from a REP's obligations under the PPA to the extent they accurately and comprehensively reflect the state of the law. ARM went on to state that if §25.482 did not accurately reflect a REP's obligations under the PPA it could potentially mislead and misinform REPs about their legal obligations under the PPA and lead to unintended con-

sequences. ARM stated that, for example, a court of competent jurisdiction interpreting the requirements of the PPA might reach a conclusion different than that reached by the commission in Docket Number 34332. ARM stated that a prudent REP would review the PPA and not §25.482 to determine its obligations. ARM says that subsections (e) and (f) aim to provide the commission the "teeth" to enforce the PPA requirements in the preceding subsections, but that it is axiomatic that an agency must enforce its own rules, and further that the PPA requires the Comptroller to establish procedures and adopt rules to administer the PPA after conducting a public hearing. ARM stated that it is clear the Texas Legislature intended the Comptroller - and not the commission - as the entity responsible for administering and enforcing the PPA.

STA stated that the appropriate and logical section for any language about the PPA is in existing §25.28 (relating to Bill Payment and Adjustments) and §25.480 (relating to Bill Payment and Adjustments). STA stated the §25.28 and §25.480 already reference the PPA, but that they require some corrections. STA concludes therefore that these rules should be amended instead of adopting the new rules. STA stated that the commission had previously determined that the appropriate place to address the PPA was in §25.28 and §25.480, and STA stated that it agrees with that prior determination. STA stated that by amending the problems with §25.28 and §25.480 the conflicts noted by Entergy are avoided.

STA stated that the PPA was fully addressed in Docket Number 11735 and later in Project Number 27804. STA stated that the commission has considered adding rule language to address the applicability of the PPA to political subdivisions and decided it was unnecessary. STA stated that PPA billing errors are not due to a lack of regulation or a lack of clarity in the rules, and that such billing errors cannot be fixed by simply amending the rules.

Entergy stated that the new §25.33 is unnecessary. Entergy stated that since the PPA was enacted, all entities billing "governmental entities" as defined by the PPA, including electric utilities, have been subject to its requirements. Entergy stated that even though the commission's rules may not specifically incorporate the PPA, §25.3 (relating to Severability Clause) clearly states that "...this chapter will not relieve electric utilities, including transmission and distribution utilities, non-utility wholesale and retail market participants, or electric customers from any duties under the laws of this state or the United States. . ." Entergy also stated that §25.33 conflicts with §25.28(b) (relating to Bill Payment and Adjustments), which provides that "[a]n electric utility providing any service to the state of Texas shall not assess a fee, penalty, interest, or other charge to the state for delinquent payment of a bill." Entergy stated that §25.33 leaves electric utilities questioning whether §25.33 is a new mandate designed to abrogate §25.28(b)'s prohibition against such fees, penalties, and assessments. Entergy concluded that adoption of the §25.33 will require another rulemaking to clarify the commission's intent. Entergy stated that electric utilities are already subject to the requirements of the PPA by virtue of §25.3. Entergy stated that adoption of §25.33 will only cause confusion and could prompt unnecessary adoption of additional Substantive Rules if only to ensure that all applicable laws that "trump" the commission's Substantive Rules are reflected in the commission's Substantive Rules. The State agreed with Entergy that the new §25.33 will conflict with §25.28(b), and suggested language in the new rule to resolve the conflict.

Commission Response

The commission agrees with the State that adoption of the rules is appropriate because they will help avoid confusion as to the applicability of the PPA to electric utilities, REPs, and aggregators. Because parts of the commission's existing billing rules conflict with parts of the PPA and the PPA controls over these rules and because the PPA applies to a large number of customers served by electric utilities, REPs, and aggregators, it is appropriate to clarify the commission's rule to state that the PPA controls over the commission's generally applicable billing rules. With respect to the interrelationship between §25.33 and the last sentence of §25.28(b), §25.33 applies to "governmental entities" as defined in the PPA, which consist of both state agencies and political subdivisions, whereas the last sentence of §25.28(b) applies only to state agencies and is narrower in scope. The commission has changed §25.33 to make clear that the last sentence of §25.28(b) continues to apply to state agencies and therefore a governmental entity that is also a state agency is not subject to a fee, penalty, interest, or other charge for delinquent payment of a bill. The commission declines to adopt STA's recommendation to amend §25.28 and §25.480 to address the PPA, because doing so would require a new rulemaking and adding the new rules rather than amending those rules accomplishes the same objective.

General Level of Detail

The State applauded the commission for crafting rules that are simple and straightforward. The State stated that new §25.33 and §25.482 will make its task of resolving billing disputes between service providers and PPA entities much easier and the obligations of both parties much clearer. The State stated that if the commission sets forth the entirety of the PPA in new §25.33 and §25.482, the commission would need to re-visit and revise the rules if the Legislature were to alter the PPA's provisions or the courts interpret the PPA in some fashion inconsistent with the detailed statement of the PPA in §25.33 or §25.482. The Cities stated that the limited scope of the proposed rules are appropriate, since the Comptroller is given the rulemaking authority with respect to the application of the PPA, not the commission.

SPS stated that rather than cite the PPA, the relevant portions of the PPA should be set out in their entirety in §25.33. Specifically, SPS stated that the general references in subsections (b), (c), and (d) are so vague and overbroad that they will likely lead to confusion and be difficult to uniformly construe and enforce. Entergy stated if the new rule is adopted, it should include PPA-specific language. Entergy stated that without the inclusion of PPA-specific language, electric utilities would be required to review the terms of the Substantive Rules, only to then realize that review of the PPA is required and that minimizing the efforts of the utilities should be an objective of the commission.

Commission Response

The commission believes that, with certain changes addressed elsewhere, the appropriate level of detail is reflected in the rule as proposed. The commission agrees with the State; new §25.33 and §25.482 will make the task of resolving billing disputes between service providers and governmental entities easier. The commission also agrees with the State that if it were to set forth PPA-specific language in the rules, it would need to change the rules if the Legislature changes the PPA or if the courts interpret the PPA in some fashion inconsistent with the language of the rule. In addition, as pointed out by the Cities, the Comptroller has rulemaking authority to implement the PPA; therefore, affected entities should look to the Comptroller's

rules, rather than the commission, for detailed guidance on the implementation of the PPA.

Section 25.28(b) Penalty on Delinquent Bills for Retail Service

ARM stated that §25.482 should be revised so that it is framed consistent with the PPA, which reflects the payment rights of PPA customers as opposed to the billing requirements of electric service providers. ARM stated that the PPA refers to "payment" and not "billing." The State stated that the proposed rule language should not be changed because it is important that utilities get in the habit of billing PPA entities in accordance with the PPA. The State stated that it has practical experience with customer service representatives who have been instructed that their employer's billing practices have the force of law. Further, the State stated that if bills are not rendered correctly, it is far less likely that the provider will accept payment correctly. The State is aware of numerous instances in which bills have been paid strictly in accordance with the PPA, only to find that late charges are improperly assessed as a result of the provider's billing practices. Cities stated that ARM is correct, that the PPA references "payment" rather than "billing." Cities opined that changing the language might not be significant, but that to the extent it might provide more clarity it supported such a change.

Commission Response

ARM's recommendation to frame the rules in terms of the payment rights of PPA customers as opposed to billing requirements of service providers is consistent with the PPA, and therefore the commission adopts this recommendation. Imposing billing requirements for service to governmental entities that are not required by the PPA could impose significant costs on service providers, and the commission therefore declines to impose such requirements as part of this rulemaking.

Section 25.33(c) and §25.482(c) Disputed Bill

The State asked the commission to clarify that the new rules are not intended to create any statute of limitations on the time for contesting overbilling to governmental entities. The Cities stated that the proposed rules correctly provide that disputes "shall be resolved as provided in the PPA," and the commission properly declines to enact a rule regarding a statute of limitations in disputes which would have exceeded its authority. ARM proposed inclusion of the PPA's requirement to dispute incorrect invoices within 21-days of receipt of the invoice in §25.482(e). Cities stated that the 21-day dispute language proposed by ARM is not germane to the inquiry requirement stated in the rule and further, to the extent such language might be construed as a statute of limitations, it would be unlawful. Entergy stated that §25.33(c) should incorporate the PPA's dispute resolution language instead of referring to the PPA.

Commission Response

The commission declines to change §25.33(c) and §25.482(c). PPA §2251.042 provides that "[a] governmental entity shall notify a vendor of an error in an invoice submitted for payment by the vendor not later than the 21st day after the date the entity receives the invoice." However, in Docket Number 34332, the commission interpreted this provision in the PPA to mean that if an invoice is not disputed, it merely means the payment is overdue on the 21st day and interest may accrue. Additionally, the commission concluded that this provision in the PPA is not a statute of limitations. Therefore, the commission declines to specifically include the PPA's 21-day dispute provision in §25.33(c).

Section 25.33(d) and §25.482(d) Penalty on Delinquent Bills for Retail Service

ARM proposed revisions to more closely align §25.482(d) with the language of the PPA. Specifically, ARM proposed that subsection (d) be re-titled "Penalty for delinquent payment for retail service," and state "Any penalty for delinquency of payment by a governmental entity to an aggregator or REP for retail service shall be in accordance with the PPA." Entergy also proposed language in §25.33(d) that clarifies that interest accrues on delinquent bills instead of penalties that might be assessed, and proposed a formula that specified the interest rate that would apply. Cities agreed with ARM that the PPA references "payment" rather than "billing."

Commission Response

The commission changes §25.33(d) and §25.482(d) to more closely align with the language of the PPA and to clarify that service providers may accept interest submitted by a PPA entity on an invoice that is delinquent, as provided in the PPA.

Section 25.33(e) and §25.382(e) Disclosure

SPS stated that it had no comment on §25.33(e) if the applicable portions of the PPA were reproduced within subsections (a) through (d). ARM stated that §25.482(e) and (f) propose to provide the commission with the "teeth" to enforce the PPA requirements preceding those subsections and that regardless of the proposed subsections, it is axiomatic that an agency must enforce its own rules. ARM then stated that the Legislature requires the Comptroller to establish procedures and adopt rules to administer the PPA. ARM went on to state that §25.482(e)'s disclosure requirement should be reframed to reflect the REP's obligation to accept payment from governmental entities in accordance with the PPA. ARM recommended a clarification that disclosure is a going forward requirement as new governmental entities are acquired as customers. ARM requests that REPs be expressly allowed to fulfill any disclosure obligation by one of the following methods: inclusion of language in the terms of service or your rights as a customer documents or by providing the disclosure orally at the time of enrollment.

STA stated that the commission's existing substantive rules relative to service provider billing should be corrected to disclose to all governmental entities that the PPA applies to electric utility billing. STA stated that to the extent electric utilities misapply or fail to apply the terms of the PPA and/or misinform customers as to the applicability of the PPA, such utilities should be required to make disclosures. STA also stated that to the extent utilities' tariffs fail to disclose the applicability of the PPA, these tariffs must also disclose the applicability of the PPA, but to the extent utilities are already in compliance with the PPA, there is no particular need to "disclose" what has already been disclosed to its customers.

Entergy recommended deletion of §25.33(e). Entergy questioned the necessity for such disclosure to a sophisticated customer, such as a governmental entity. Entergy stated that this requirement merely adds additional administrative burden to the electric utilities that provide little, if any, benefit to customers. The State stated that residential customers need not be notified of their potential status as governmental agencies. However, the State continued by stating that state park rangers, prison wardens, etc, occupy government-owned housing that is billable under the PPA, and it expects service providers to proactively treat these customers in the correct fashion. The Cities stated

that if the rule contains a notice requirement, it should place the burden on the providers.

Commission Response

The commission has determined that the PPA applies to electric service. See *Petition of Houston Lighting and Power Co.*, Docket Nos. 6765 and 6766, 13 Tex. P.U.C. Bull. 365, 426 (Nov. 14, 1986). Therefore, the commission believes that to ensure PPA-eligible entities are billed correctly by electric service providers, identification of PPA-eligible entities is necessary. To accomplish this task, the commission requires electric service providers to notify all non-residential customers of the applicability of the PPA to their service. The commission has revised subsection (e) to incorporate and clarify its intentions as originally expressed in proposed subsections (e) and (f), and re-titled the subsection "Notice."

Section 25.33(f) Inquiry

The State stated that the new rules properly place the burden on service providers to make inquiry into each customer's status. The State also stated that it agreed with ARM that residential customers need not be notified of their potential status as governmental entities. SPS stated that it made no comment on §25.33(f) if the language of the applicable portions of the PPA is reproduced within subsections (a) through (d).

Cities stated that it supports placing the burden on providers to ascertain whether a customer is a governmental entity for purposes of PPA compliance. Cities stated that this should not be a significant burden because in most cases, the customer's identity as a governmental entity is obvious to the provider. But, in cases where it is not obvious, it is fairly simple for a customer service representative to ask whether the customer is a governmental entity during enrollment. Cities stated that placing the burden of notification on governmental entities presented significant difficulties because many entities might not be aware of such commission-ordered notification requirement. And, in those cases where an entity did not know and failed to notify their provider that they are PPA eligible, it might be construed as a waiver of the protections of the PPA for that entity, a result which is void under the PPA. Therefore, Cities concluded, the rules properly place the burden on the providers. Cities also stated that the six-month time frame proposed in the rule for a provider to inquire whether its current customers are governmental entities is reasonable for those few customers the provider has doubts as to their status as a governmental entity. However, Cities stated that consequences for failure to inquire is unclear and that failure to do so still has no effect on the entity's rights under the PPA. Cities disagreed with STA that disclosure and inquiry obligations would be "extremely onerous" to the providers. Cities stated that although ARM may be correct, that most governmental entities self-identify, placing the burden to inquire on the utility is substantially less burdensome than attempting to communicate to every governmental entity that it needs to inform its provider that it should be billed in accordance with the PPA.

ARM stated that §25.482(e) and (f) aim to provide the commission with the "teeth" to enforce the PPA requirements preceding those subsections. However, regardless of those proposed subsections' existence, it is axiomatic that an agency must enforce its own rules and further that the Legislature requires the Comptroller to establish procedures and adopt rules to administer the PPA. ARM went on to state that if §25.482 is adopted, subsection (f) should be removed because the PPA does not require inquiry and the costs of imposing the inquiry requirement

would outweigh its benefits. ARM said the inquiry requirement imposes a burden on the retail electric market that is not imposed on other vendors that contract with governmental entities. ARM said there is no reason to single out the retail electric market for these additional requirements. ARM stated that in its experience, governmental entities are generally familiar with the PPA and typically identify themselves for eligibility. ARM stated that its view is that the benefits of subsection (f) are small since it believes that the overwhelming majority of governmental entity customers self-identify. Further, ARM stated that the costs of complying with the inquiry requirement outweigh any perceived benefit. ARM stated that even if residential customers are excluded from the inquiry requirement, as it recommends, the average handle time for non-residential customers will increase. ARM stated that its view is that the inquiry will often lead to follow-up questions by the applicant regarding what the PPA is, what protections are afforded to customers under it, and whether there is any opportunity for the applicant to meet the definition. ARM stated that this single question has the potential to add 30 seconds or more to hundreds of thousands of non-residential enrollments in the market. ARM stated that since most PPA entities are familiar with the PPA, all of the additional call-handling time will be expended on customers who do not qualify, resulting in reduced service levels and increased frustration and costs for all customers. Moreover, ARM stated, the additional requirement on REPs to make this PPA inquiry with all existing customers for whom a REP does not know whether they are a governmental entity as defined in the PPA, imposes additional and substantial costs. If REPs are required to send a separate letter to non-residential customers, one REP in the market estimates it would result in approximately \$100,000.00 of additional costs to that REP alone.

ARM stated that the inquiry requirement should not apply to residential customers. ARM stated that the proposed language of subsection (f) is overly broad and would impose unnecessary costs on the market. Since by definition a residential customer cannot be a state agency or a political subdivision of the state, ARM recommended an express limitation of the inquiry requirement to nonresidential customer/applicants. If the inquiry requirement is included in this adopted version of §25.482, ARM proposed that a REP be required to inquire about the applicability of the PPA if the name of the applicant contains one of the specified governmental entities named in the PPA. Then, if the name of the applicant does not contain one of the specified governmental entities named in the PPA, the governmental entity should be expected to self-identify to take advantage of the remedies under the PPA. ARM admitted that the broad inquiry currently in the rule addresses the commission's concern that customer accounts are processed correctly.

STA stated that the requirement that all electric providers inquire of all applicants whether they are governmental entities and to contact all existing customers to inquire whether they are governmental entities is extremely onerous. STA stated that it is unlikely that any utility has a mechanism in place to distinguish governmental entities from non-governmental entities, thus the utility might have to contact each and every customer, for each and every account. STA stated that the proposed rules do not specify how customers should be contacted, presuming it would be by phone or letter. But STA asked who would receive the letter or phone call? STA asked what made the commission think that an inquiry is practicable or would produce any appreciable benefit to governmental entities. STA stated that the proposed inquiry requirement will impose an onerous burden upon utili-

ties, when there is not even a scintilla of evidence suggesting non-compliance with the PPA. STA stated that electric utilities should be required to inquire and disclose the applicability of the PPA only in the event that such utilities have misapplied or failed to apply the terms of the PPA and/or misinformed customers as to the applicability of the PPA.

Entergy requested that §25.33(f) be removed from the new rule. Entergy stated that the requirement to make a "blanket" inquiry as it addresses service requests from new customers adds an administrative burden that is unnecessary. Entergy stated that when gathering information to provide electric service, electric utility representatives are fully capable of determining, in large part by requesting the customer's name and type of service requested, whether the applicant qualifies as a governmental entity. To require that this additional inquiry be asked of those customers who clearly are not governmental entities places an unnecessary and time-consuming burden on Entergy representatives. Entergy stated that by making this inquiry of customers who are clearly not governmental entities, the door is opened for numerous additional questions from the applicant. Entergy stated that its response times will likely be lengthened because of the initial inquiry and the potential follow-up conversation. Entergy stated that governmental entities are sophisticated entities that are aware fully of their rights as a governmental entity, and if not specifically asked, likely will advise the electric utility of their status as a governmental entity as defined in the PPA. Entergy asked whether the commission is asking it to review all of its customer lists to determine whether it is confident that its coding is correct? If so, Entergy stated that the commission is imposing an additional, unnecessary administrative requirement to the electric utility's already burdensome list of administrative responsibilities.

In a letter filed after the proposal for adoption was filed with the commission, Cities stated that the rules are internally inconsistent. Cities stated that although they support the applicability of the PPA to PUC proceedings and do not object to the overall direction of the proposed rules, the appearance of subsections (e)(1) and (2) for the first time in the proposal for adoption is problematic. Cities stated that subsections (e)(1) and (2) are internally inconsistent with subsection (c) relating to disputed bills, because they suggest that in a PPA billing complaint proceeding, the commission could consider facts other than those stated in the PPA, and may limit a party's relief under the PPA after such consideration. Cities stated that PPA rights cannot be waived and that the PPA includes no notice requirement or condition on a party's rights or remedies. Cities stated that if the commission believes it has the legal authority to undertake the consideration of notice as set forth in subsections (e)(1) and (2), that authority must derive from the statute and does not require a rule to embody it, rendering the provisions unnecessary. Cities ask that paragraphs (1) and (2) be removed from any rules ultimately adopted.

Commission Response

The commission deletes subsection (f). The commission incorporates and clarifies its intent as originally proposed in subsections (e) and (f), identification of PPA-eligible entities, in revised subsection (e). The commission concludes that the appropriate balance between maximizing compliance with the PPA and minimizing costs to service providers is to require service providers to provide written notice to all of their non-residential customers of the applicability of the PPA to their service to governmental entities and has changed the rules accordingly. This requirement

is not burdensome but will increase the likelihood that governmental entities will inform their service providers of their status as governmental entities subject to the PPA. The commission requires utilities, REPs, and aggregators to provide this notice to their existing non-residential customers within six months of the effective date of this section and, within three months of the effective date of this section, to new non-residential customers at the same time as or before the terms of service are provided to the customer. The commission clarifies that failure to provide this notice does not create an independent claim under the PPA and that the notice does not initiate or terminate either party's rights or obligations under the PPA.

In addition and consistent with its decision in Docket Number 34332, the commission has revised the rules to state that the failure of a service provider to provide written notice in accordance with this subsection may be considered in a PPA billing complaint and the failure of a governmental entity to inform the service provider of its status as a governmental entity may be considered in a PPA billing complaint. These provisions provide incentives for a service provider to provide the required notice and for a governmental entity to inform its service provider of its status as a governmental entity. The commission does not agree with Cities that these provisions make the rules internally inconsistent. First, subsection (c) operates from the presumption that both parties know their billing is according to the PPA; therefore identification of PPA status has already been accomplished. Second, while Cities is correct that the commission's consideration of the factors listed in subsection (e)(1) and (2) could limit a party's relief in a complaint proceeding before the commission, this result is consistent with commission precedent. See *Complaint of Harris County Hospital District Against Southwestern Bell Telephone, LP d/b/a AT&T Texas*, Docket No. 34332, Order at 2 (April 15, 2009). In that case, the commission decided that because Harris County Hospital District (HCHD) was a large, sophisticated public entity with sufficient resources to have discovered and addressed the billing problem long before it brought the complaint to the commission, it was appropriate to hold HCHD partially responsible for the prolonged accrual of overcharges. *Id.* Subsection (e)(1) and (2) are intended to memorialize the commission's decision in the HCHD case. However, these provisions do not initiate or terminate a party's rights or obligations under the PPA. Instead, the primary intent of these provisions is to increase the likelihood that PPA-entities will be identified and billed correctly. Finally, these provisions are directly responsive to concerns raised by commenters regarding a lack of consequences for failure to provide notice, and claiming that notice is onerous and meaningless unless the PPA entities are required to respond. The commission cannot require PPA entities to self-identify. However, an entity's identifying itself as eligible for PPA billing, especially after receiving the required notice from its electric service provider, is reasonable and reduces the chance of incorrect billing.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these rules, the commission makes changes for the purpose of clarifying its intent.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.33

The new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and

Supp. 2009) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.004, which authorize the commission to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices by CTUs.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §17.004.

§25.33. Prompt Payment Act.

(a) Application. This section applies to billing by an electric utility (utility) to a "governmental entity" as defined in Texas Government Code Chapter 2251, the Prompt Payment Act (PPA). This section controls over other sections of this chapter to the extent that they conflict.

(b) Time for payment by a governmental entity. A payment by a governmental entity subject to the PPA shall become overdue as provided in the PPA.

(c) Disputed bills. If there is a billing dispute between a governmental entity and a utility about any bill for utility service, the dispute shall be resolved as provided in the PPA.

(d) Interest on overdue payment. Interest on an overdue governmental entity payment shall be calculated by the governmental entity pursuant to the terms of the PPA and remitted to the utility with the overdue payment. However, pursuant to §25.28(b) of this title (relating to Bill Payment and Adjustments), a governmental entity that is also a state agency is not subject to a fee, penalty, interest, or other charge for delinquent payment of a bill.

(e) Notice. A utility shall provide written notice to all of its non-residential customers of the applicability of the PPA to the utility's service to governmental entities. This notice shall be completed within six months of the effective date of this section for existing non-residential customers and, within three months of the effective date of this section, shall be provided to a new customer at or before the time that the terms of service are provided to the customer. A utility's failure to provide this notice does not give rise to any independent claim under the PPA, nor does this notice initiate or terminate any party's rights or obligations under the PPA.

(1) The failure of a utility to provide written notice in accordance with this subsection may be considered in a PPA billing complaint.

(2) The failure of a governmental entity to inform the utility of its status as a governmental entity may be considered in a PPA billing complaint.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

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Public Utility Commission of Texas

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For further information, please call: (512) 936-7223

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**SUBCHAPTER R. CUSTOMER PROTECTION
RULES FOR RETAIL ELECTRIC SERVICE**

16 TAC §25.482

The new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.004, which authorize the commission to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices by CTUs.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §17.004.

§25.482. Prompt Payment Act.

(a) Application. This section applies to billing by an aggregator or a retail electric provider (REP) to a "governmental entity" as defined in Texas Government Code, Chapter 2251, the Prompt Payment Act (PPA). This section controls over other sections of this chapter to the extent that they conflict.

(b) Time for payment by a governmental entity. A payment by a governmental entity subject to the PPA shall become overdue as provided in the PPA.

(c) Disputed bills. If there is a billing dispute between a governmental entity and an aggregator or a REP about any bill for aggregator or REP service, the dispute shall be resolved as provided in the PPA.

(d) Interest on overdue payment. Interest on an overdue governmental entity payment shall be calculated by the governmental entity pursuant to the terms of the PPA and remitted to the ESP with the overdue payment.

(e) Notice. An aggregator or REP shall provide written notice to all of its non-residential customers of the applicability of the PPA to the aggregator's or REP's service to governmental entities. This notice shall be completed within six months of the effective date of this section for existing non-residential customers and, within three months of the effective date of this section, shall be provided to a new customer at or before the time that the terms of service are provided to the customer. An aggregator's or REP's failure to provide this notice does not give rise to any independent claim under the PPA, nor does this notice initiate or terminate any party's rights or obligations under the PPA.

(1) The failure of an aggregator or REP to provide written notice in accordance with this subsection may be considered in a PPA billing complaint.

(2) The failure of a governmental entity to inform the aggregator or REP of its status as a governmental entity may be considered in a PPA billing complaint.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005336

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §26.33

The Public Utility Commission of Texas (commission) adopts new §26.33, relating to the Prompt Payment Act (PPA) with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2470).

The rule ensures that customers that are "governmental entities" under Texas Government Code (Prompt Payment Act or PPA) are billed by certificated telecommunications utilities (CTUs) in compliance with the PPA. This new section is adopted under Project Number 36260.

A public hearing was not requested.

The commission received initial comments on the rule from the State of Texas (State); the Steering Committee of Cities Served by Oncor (Cities); GTE Southwest Incorporated d/b/a Verizon Southwest, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively, Verizon); Southwestern Bell Telephone company d/b/a AT&T Texas (AT&T). The commission received reply comments from Southwestern Tariff Analyst (STA); the State; Verizon; AT&T Texas Statewide Telephone Cooperative (TSTCI); Cities; and United Telephone Company of Texas, Inc. d/b/a CenturyLink, Central Telephone Company of Texas, Inc. d/b/a CenturyLink, CenturyTel of San Marcos, Inc. d/b/a CenturyLink, CenturyTel of Lake Dallas, Inc. d/b/a CenturyLink, CenturyTel of Port Aransas, Inc. d/b/a CenturyLink, and CenturyTel of Northwest Louisiana, Inc. d/b/a CenturyLink, CenturyLink Acquisitions (collectively, CenturyLink).

Comment Summary

General Need for the New Rule

The State stated that it supports addition of the rule to the commission's substantive rules. The State stated that when resolving billing disputes between agencies and service providers, the most difficult aspect, for its counsel and support staff, is convincing providers that the PPA applies to utility bills. CenturyLink stated that the rule addresses a longstanding billing problem for certificated telecommunication utilities (CTUs) and governmental entities, particularly when it comes to the imposition of late fees. CenturyLink stated that in the past few years, the commission has received complaints from various governmental entities about CTU billing, with the problem usually stemming from the CTU being unaware that the customer qualifies as a governmental entity under the PPA or that the customer is a governmental entity for purposes of the CTU's tariff. CenturyLink noted that it

had been caught off guard when one of its customers, a hospital district, subsequently became a "special district." With a caveat asking for more detail, CenturyLink stated that it supports the commission's proposed attempt to clarify the applicability of the PPA to billing by CTUs.

The Cities stated that they believe that the rule is unnecessary because the PPA itself establishes the procedure for payments by governmental entities regardless of whether the rule provides for application of the PPA. STA stated that the appropriate and logical section for any language about the PPA is in the existing §26.27, relating to Bill Payment and Adjustments. STA stated that the applicability of the PPA to telephone and electric utilities has been clear since the Texas Legislature removed the contract exemption language from the PPA in 1993 and that the PPA was fully addressed in Docket Number 11735. STA stated that the commission has considered adding rule language to address the applicability of the PPA to political subdivisions and decided it was unnecessary. STA stated that the commission intended existing §26.27 to address the PPA. STA stated that PPA billing errors are not due to a lack of regulation or a lack of clarity in the rules, and that such billing errors cannot be fixed by simply amending the rules.

CenturyLink stated that the PPA does not waive late fees for PPA entities and noted that only state agencies, and not all political subdivisions, are exempt from late fees under the Public Utility Regulatory Act (PURA). Thus, CenturyLink stated that a CTU's waiver of late fees under PURA is more generous than required by the PPA. CenturyLink stated that a complaint to the commission is not the only recourse for a governmental entity under the PPA, and that governmental entities are not required to look to the Commission to enforce the PPA.

Commission Response

The commission agrees with the State that adoption of the rules is appropriate because it will help avoid confusion as to the applicability of the PPA to CTUs. Because parts of §26.27 are inconsistent with parts of the PPA and the PPA controls over these rules and because the PPA applies to a large number of customers served by CTUs, it is appropriate to clarify the Commission's rule to state that the PPA controls over the commission's generally applicable billing rules. The commission declines to adopt STA's recommendation to amend §26.27 to address the PPA, because doing so would require a new rulemaking and adding the new rule rather than amending §26.27 accomplishes the same objective.

General Level of Detail

The State applauded the commission for crafting a rule that is simple and straightforward. The Cities stated that the limited scope of the rule is appropriate, since the Texas Comptroller of Public Accounts (Comptroller) is given the rulemaking authority with respect to the application of the PPA, not the Commission. However, Verizon stated that the rule does not provide clarity or resolve the problems the rulemaking was intended to prevent. CenturyLink requested more detail in the rule. AT&T suggested several specific revisions to the rule that provide more detail. Specifically, AT&T stated that §26.33(b) is a simple statement that is inadequate for two reasons: it fails to distinguish two PPA provisions and it does not adequately address the effects of following (or failing to follow) such procedures. The State stated that the kind of prescriptive detail that AT&T wants is not necessary. The State stated that they have a great deal of experience in resolving billing disputes between agencies and service

providers, and as noted above the most difficult aspect, both for counsel and its support staff, is convincing providers that the PPA applies to utility bills. The State stated that once utilities are given a copy of the PPA, most such disputes are easily handled and that simply stating that bills, billing disputes, and penalties for delinquent bills shall be resolved in accordance with the PPA is all that is necessary. The State also noted that the level of detail sought by AT&T does not allow for changes to the PPA or its construction, and that AT&T's amendments would freeze AT&T's preferred view in the commission's substantive rules.

Commission Response

The commission believes that, with certain changes addressed elsewhere, the appropriate level of detail is reflected in the rule as proposed. The commission agrees with the State; new §26.33 will make resolving disputes between CTUs and governmental entities easier. The commission also agrees with the State that if it were to set forth PPA-specific language in the rule, it would need to change the rule if the Legislature changes the PPA or if the courts interpret the PPA in some fashion inconsistent with the language of the rule. In addition, as pointed out by the Cities, the Comptroller has rulemaking authority to implement the PPA; therefore, affected entities should look to the Comptroller's rules, rather than the commission, for detailed guidance on the implementation of the PPA.

Section 26.33(b) Bill Due Date

AT&T suggested that §26.33(b) should be re-titled "Time for payment by a governmental entity" and should state "A payment by a governmental entity subject to the PPA shall become overdue as provided in the PPA." AT&T states that its billing systems do not differentiate between governmental and non-governmental customers with regards to due dates, and changes to billing systems are costly. Additionally, AT&T stated that billing system changes to accommodate the PPA would be very complicated because the PPA contains two potential overdue timing provisions under which there are three different methods by which a governmental entity can calculate when the overdue time period begins. AT&T stated that the due date listed on a governmental entity's bill is unrelated to the PPA and addressing it in this rulemaking is unnecessary, especially since CTUs must comply with the PPA. AT&T stated that the PPA places the burden of calculating a correct payment date and amount for overdue payments on the governmental entity. AT&T proposed changes to §26.33(b) to more accurately reflect the terms of the PPA.

STA stated that AT&T's concerns about difficulty calculating a due date for governmental entities were completely hypothetical speculation and stated that AT&T has for over a decade differentiated between federal government entities and all other customers for purposes of calculating a due date. STA stated that AT&T bills all of its customers in advance, with the sole exception being service to federal entities, which AT&T bills in arrears. STA stated that AT&T's policy manual expresses the method to differentiate between federal governmental entities and other customers and that its actual billing practice is to extend the time for payment only for federal entities. STA stated that AT&T need only implement its policy as expressed in its policy manual to extend the time for payment to PPA-eligible entities. STA stated that AT&T is correct that the due date expressed on a bill does not affect the date an invoice is overdue under the PPA, but that the due date on the bill should not misstate the due date. STA supported AT&T suggested changes to §26.33(b). Cities stated that to the extent AT&T's proposed changes would bring more clarity, the modifications are appropriate.

Commission Response

The commission concludes that the stated due date on a CTU's bill to a governmental entity does not affect the governmental entity's rights under the PPA and adopts AT&T's proposed revisions to §26.33(b), with minor changes. These revisions accurately reflect the requirements of the PPA. PPA §2251.021 generally provides that a payment by a governmental entity is overdue on the 31st day after the date the governmental entity receives an invoice for the goods or service.

Section 26.33(c) Disputed Bill

The State asked the Commission to clarify that the rule is not intended to create any statute of limitations on the time for contesting overbilling of governmental entities. The Cities stated that the rule correctly provides that disputes "shall be resolved as provided in the PPA," and properly declines to enact a rule regarding a statute of limitations. AT&T stated that the simple statement in the proposed rule was inadequate because it fails to distinguish between the PPA's "Disputed Payment" provision and its "Vendor Remedy for nonpayment of Contract" provisions. AT&T also stated that merely stating that billing disputes should be resolved pursuant to the terms of the PPA fails to adequately address the effect of following (or failing to follow) such procedures. AT&T asked that the PPA's 21-day dispute provision be included in the rule because it is unambiguous and mandatory.

STA stated that the PPA does not impose any duty to dispute errors within 21 days, and cited the commission's holding in Docket Number 34332 that the PPA's mandatory dispute language merely means that payment of the invoice is overdue on the 31st day if no dispute is raised and that failure to dispute potentially exposes a governmental entity to interest charges beginning with the date that payment of the invoice becomes overdue. The State stated that if the Commission incorporates the PPA's 21-day notice of dispute requirement into the rule, and the Legislature were to alter this requirement or the courts interpret it in some fashion contrary to the commission's rule, the commission would need to revisit and revise the rule. The State also stated that there is no support in the PPA, PURA, or the commission's existing rules for AT&T's proposed notice and dispute provisions.

AT&T requested that the Commission create exceptions to the commission's existing overbilling rule to explicitly allow for a partial refund when a governmental entity fails to comply with certain obligations under the rule. The Cities stated that AT&T's suggested language is beyond the Commission's rulemaking authority. Cities also stated that while the PPA establishes a time period for a governmental entity to dispute billings, it does not limit the entity's ability to seek correction of those errors after payment has been made. Cities stated that AT&T's language would deny governmental entities the protection of PURA that all other customers enjoy. Cities stated that AT&T's suggested language is an attempt to insert a statute of limitations which contradicts the positions of the Comptroller and the commission. Cities stated that the commission has stated that an interpretation of the PPA that precludes a governmental entity from disputing an invoice after the 21-day period would render statutes dealing with the auditing of governmental entities on a quadrennial basis meaningless because errors identified in the audits would be discovered well after the 21-day period had passed.

CenturyLink stated that a PPA entity's failure to notify the CTU that it is PPA eligible should be taken into account if there is a claim for refunds under §26.27.

Commission Response

The Commission declines to change §26.33(c). AT&T is correct that the PPA's dispute provision is unambiguous and mandatory. PPA §2251.042 provides that "[a] governmental entity shall notify a vendor of an error in an invoice submitted for payment by the vendor not later than the 21st day after the date the entity receives the invoice." However, STA and Cities correctly cite commission precedent on this provision. In Docket Number 34332, the commission interpreted this provision in the PPA to mean that if an invoice is not disputed, it merely means the payment is overdue on the 31st day and interest may accrue. Additionally, the Commission concluded that this provision in the PPA is not a statute of limitations. Therefore, the commission declines to specifically include the PPA's 21-day dispute provision in §26.33(c).

Section 26.33(d) Penalty on Delinquent Bills for Retail Service

AT&T stated that the title and language of this subsection should be amended to more closely align with the language in the PPA, because the PPA imposes the obligation to calculate and remit interest on overdue payments on PPA-eligible entities. AT&T stated that the current title and language leaves room for confusion.

Commission Response

The commission agrees with AT&T and adopts its suggested amendment to §26.33(d). In addition, the commission clarifies that CTUs may accept interest submitted by a PPA entity on an overdue payment. Furthermore, the commission clarifies that, pursuant to §26.27(a)(2) (relating to Bill Payment and Adjustments), a governmental entity that is also an agency in any branch of government is not subject to a fee, penalty, interest, or other charge to the state for delinquent payment of a bill from a dominant certificated telecommunications utility.

Section 26.33(e) Disclosure

Verizon stated that the rational and prudent approach is to place the burden on the governmental entity to disclose to a CTU any accounts that it may have that are subject to the PPA so that the CTU can establish the appropriate billing arrangement. Verizon went on to state that a CTU employee is unlikely to have the facts and information necessary to determine the legal status of each customer when setting up the initial billing arrangements, and further a CTU should not bear the responsibility to determine the legal status of a customer under the PPA. Verizon went on to state that the PPA-eligible entity possesses the information and is better positioned to determine its eligibility under the PPA. Verizon stated that a governmental entity is not likely to receive service from many CTUs, but that the CTU on the other hand could have hundreds of customers that are PPA-eligible, and therefore placing the burden on the CTU to identify all PPA-eligible entities is unduly burdensome. Verizon stated that this issue is compounded because a governmental entity may have multiple accounts with a single CTU, which can be confusing. Verizon stated that it is not always clear that a given account is associated with a governmental entity, citing as an example a residential property owned by a hospital district to which the CTU provides service.

AT&T recommended deletion of §26.33(c) because of the amendments it proposed to §26.33(d). AT&T stated that if the CTU sends inquiry as required by §26.33(d) and the PPA-eligible entity provides sufficient notice and supporting documentation as AT&T proposes, then it can be presumed that the CTU will

bill the governmental entity in accordance with the PPA. STA stated that no commenter expressed that any telephone or electric utility has generally misapplied the PPA with regards to the application of late payment charges. STA stated that it does not support the rule's disclosure language.

Commission Response

The commission has determined that the PPA applies to telephone service. See *Petition of Southwestern Bell Telephone Company for Authority to Change Rates*, P.U.C. Docket No. 6200, Order, 1986 WL 383429 at 29-30 (September 24, 1986). Therefore the commission believes that to ensure PPA-eligible entities are billed correctly by CTUs, identification of PPA-eligible entities is necessary. To accomplish this task, the commission requires CTUs to notify all non-residential customers of the applicability of the PPA to their service. The commission has revised subsection (e) to incorporate and clarify its intentions as originally expressed in subsections (e) and (f), and re-titled the subsection "Notice."

Section 26.33(f) Inquiry

The State and Cities stated that the rule properly places the burden upon a CTU to make inquiry into each customer's status. Cities stated that the inquiry requirement is not a significant burden because in most cases, the customer's identity as a governmental entity is obvious to the utility, and where it is not it is fairly simple to ask during enrollment. Conversely, Cities stated that placing the burden on governmental entities is significantly difficult because many PPA-eligible entities might not know of the notification requirement and because the failure to notify could be construed as an effective waiver of their rights under the PPA, which is statutorily void. Cities stated that the PPA applies regardless of whether a utility knows the customer is PPA-eligible, and given that a PPA-entity's rights under the PPA cannot be waived, the burden of inquiry is rightfully placed on the utilities. Cities stated that the 6-month inquiry period established in the rule is reasonable, but stated that the rule is unclear as far as consequences for a utility that fails to inquire. Cities noted again that failure to inquire has no effect on the PPA-eligible entities' rights under the PPA.

Verizon stated that the rational and prudent approach is to place the burden on the governmental entity to disclose to a CTU any accounts that it may have that are subject to the PPA so that the CTU can establish the appropriate billing arrangement. Verizon went on to state that a CTU employee is unlikely to have the facts and information necessary to determine the legal status of each customer when setting up the initial billing arrangements, and further a CTU should not bear the responsibility to determine the legal status of a customer under the PPA. Verizon went on to state that the PPA-eligible entity possesses the information and is better positioned to determine its eligibility under the PPA. Verizon stated that a governmental entity is not likely to receive service from many CTUs, but that the CTU on the other hand could have hundreds of customers that are PPA-eligible, and therefore placing the burden on the CTU to identify all PPA-eligible entities is unduly burdensome. Verizon stated that this issue is compounded because a governmental entity may have multiple accounts with a single CTU, which can be confusing. Verizon stated that it is not always clear that a given account is associated with a governmental entity, citing as an example a residential property owned by a hospital district to which the CTU provides service.

AT&T stated that §26.33(f) appears to have been designed to address the concern of properly identifying PPA-eligible entities. AT&T requested that the rule be clarified that the CTU be required to send the inquiry to its customers, through a bill message or otherwise, and that a governmental entity be required to affirmatively notify the CTU if they are a governmental entity subject to the PPA within 60 days of receipt of the CTU's inquiry. AT&T stated that this places the proper burden on each party, the CTU to inquire, the PPA-entity to identify itself.

AT&T went on to state that the rules should also explicitly create an exception to the existing overbilling rule to explicitly allow for a partial refund when a governmental entity fails to notify a CTU of its status as a PPA-eligible entity. AT&T stated that such an exception is not a *per se* waiver of any rights a governmental entity has under the PPA. AT&T stated that the failure of a PPA entity to identify itself should have some effect and should be taken into account in determining the appropriate amount of any refund. AT&T noted that this is consistent with Commission precedent.

AT&T stated that the rule should require the governmental entity to provide some form of supporting documentation, similar to what tax-exempt customers are currently required to provide to receive tax-exempt status, along with its self-identification which clearly indicates that a governmental entity is subject to the PPA's terms. AT&T expressed concern that it might get responses from customers that self-identify as being PPA eligible, when they are not.

STA stated that because there is no evidence of a widespread problem, it does not support the disclosure or the inquiry language in the proposed rule. STA stated that the facts are CTUs generally had a policy and practice of suppressing late payment charges for political subdivisions. STA stated that the billing errors that occur are not from lack of regulation or a lack of clarity in the rules, and thus cannot be fixed by amending the rules. The State stated that the premise that it is difficult to identify PPA-eligible entities is without merit because it is only aware of the two complaint dockets initiated by STA on behalf of its client political subdivision, and further stated that there was never any serious doubt that STA's client complainant was a political subdivision of the State of Texas.

Verizon stated that the burden of identifying when an entity is PPA-eligible should rest on the PPA entity, not the CTU. Verizon stated that having the governmental entity notify the CTU of its status under the PPA so that the appropriate billing arrangement can be established is a more fair, efficient, and practical approach. TSTCI stated that it is concerned with the obligations and burdens that the rule would place on its member companies by putting all of the responsibility on the CTU for identifying which customers are governmental entities subject to the PPA. TSTCI agrees with Verizon that this would put CTUs in the impossible position of identifying governmental entities subject to the PPA and informing them of their rights under the PPA without access to the necessary information and any obligation on the part of the governmental entity to disclose this information. TSTCI stated that it is not equitable to impose all of the burdens on the CTU when the governmental entity receives all the benefits of PPA billing. Moreover, TSTCI stated that the process for notifying existing and new customers as contemplated in the proposed rule could lead to abuse absent a requirement for supporting documentation from the governmental entity. TSTCI supported AT&T's proposal to delete §26.33(e) and modify §26.33(f).

Cities support the rule because it places the burden of inquiry regarding a customer's status as a PPA entity on the CTU, and because regardless of whether the CTU can identify a PPA-eligible entity, the PPA applies to that entity's billing. Cities stated that AT&T's proposed exception to the commission's *per se* overbilling rule is a statute of limitations and that such a limitation is beyond the commission's authority. Cities goes on to say that enacting a specific rule addressing billing disputes by governmental entities and creating a statute of limitations would be inconsistent with the law and bad public policy. Cities also stated that this change would deny PPA entities consumer protections provided by PURA because all other customers are entitled to a full refund for overbilling, but the suggested change would limit recovery for overbilling related to the PPA. Cities also stated that the commission's prior interpretation of the PPA precludes it from adopting the suggested revisions because they are inconsistent with the statutory requirement for quadrennial audits of governmental entities. Cities stated that in most cases it is obvious to a utility that their customer is a PPA entity, and for those few customers who are not easily identified, a simply inquiry by the CTU is all that is required. Cities agrees with AT&T that requiring the CTU to send an inquiry to its customers places the proper burden on each party, the CTU to inquire and the governmental entity to identify itself. Cities stated that it fears that placing a notification requirement on PPA entities might be construed as a waiver of rights if the entity fails to identify itself, which waiver is void under the PPA. Cities noted that the PPA applies whether the utility knows of the entity's PPA-eligible status, and there can be no waiver of PPA rights.

CenturyLink stated that since a complaint of overbilling based on the PPA but brought to the commission invokes the commission's singular authority under PURA, not the PPA, the rule should recognize that overbilling complaints by governmental entities often have little to do with the PPA and are mostly about applying a CTU's tariff, which depends on the ability of the CTU to identify the customer as a governmental entity. CenturyLink stated that in that context, requiring a governmental entity to identify itself as such makes sense. Further, CenturyLink stated that allowing discretion as to the period that refunds may be due when the governmental entity did not reasonably identify itself as such, nor protest its bill for many years, also makes sense. CenturyLink stated that it supports AT&T's suggested modifications.

In a letter filed after the proposal for adoption was filed with the commission, Cities stated that the rule is internally inconsistent. Cities stated that although they support the applicability of the PPA to PUC proceedings and do not object to the overall direction of the proposed rule, the appearance of subsection (e)(1) and (2) for the first time in the proposal for adoption is problematic. Cities stated that subsection (e)(1) and (2) are internally inconsistent with subsection (c) relating to disputed bills, because they suggest that in a PPA billing complaint proceeding, the commission could consider facts other than those stated in the PPA, and may limit a party's relief under the PPA after such consideration. Cities stated that PPA rights cannot be waived and that the PPA includes no notice requirement or condition on a party's rights or remedies. Cities stated that if the commission believes it has the legal authority to undertake the consideration of notice as set forth in subsection (e)(1) and (2), that authority must derive from the statute and does not require a rule to embody it, rendering the provisions unnecessary. Cities ask that paragraphs (1) and (2) be removed from any rules ultimately adopted.

Commission Response

The commission deletes subsection (f). The commission incorporates and clarifies its intent as originally proposed in subsections (e) and (f), identification of PPA-eligible entities, in revised subsection (e). The commission concludes that the appropriate balance between maximizing compliance with the PPA and minimizing costs to CTUs is to require CTUs to provide written notice to all of their non-residential customers of the applicability of the PPA to their service to governmental entities and has changed the rules accordingly. This requirement is not burdensome but will increase the likelihood that governmental entities will inform their CTUs of their status as governmental entities subject to the PPA. The commission requires CTUs to provide this notice to their existing non-residential customers within six months of the effective date of this section and, within three months of the effective date of this section, to new non-residential customers at the same time as or before the terms of service are provided to the customer. The commission clarifies that failure to provide this notice does not create an independent claim under the PPA and that the notice does not initiate or terminate either party's rights or obligations under the PPA.

In addition and consistent with its decision in Docket Number 34332, the commission has changed the rules to state that the failure of a CTU to provide written notice in accordance with this subsection may be considered in a PPA billing complaint and the failure of a governmental entity to inform the CTU of its status as a governmental entity may be considered in a PPA billing complaint. These provisions provide incentives for a CTU to provide the required notice and for a governmental entity to inform its service provider of its status as a governmental entity.

The commission does not agree with Cities that these provisions make the rule internally inconsistent. First, subsection (c) operates from the presumption that both parties know their billing is according to the PPA; therefore identification of PPA status has already been accomplished. Second, while Cities is correct that the commission's consideration of the factors listed in subsection (e)(1) and (2) could limit a party's relief in a complaint proceeding before the commission, this result is consistent with commission precedent. See *Complaint of Harris County Hospital District Against Southwestern Bell Telephone, LP d/b/a AT&T Texas*, Docket No. 34332, Order at 2 (April 15, 2009). In that case, the commission decided that because Harris County Hospital District (HCHD) was a large, sophisticated public entity with sufficient resources to have discovered and addressed the billing problem long before it brought the complaint to the commission, it was appropriate to hold HCHD partially responsible for the prolonged accrual of overcharges. *Id.* Subsections (e)(1) and (2) are intended to memorialize the commission's decision in the HCHD case. However, these provisions do not initiate or terminate a party's rights or obligations under the PPA. Instead, the primary intent of these provisions is to increase the likelihood that PPA-entities will be identified and billed correctly. Finally, these provisions are directly responsive to concerns raised by commenters regarding a lack of consequences for failure to provide notice, and claiming that notice is onerous and meaningless unless the PPA entities are required to respond. The commission cannot require PPA entities to self-identify. However, an entity's identifying itself as eligible for PPA billing, especially after receiving the required notice from its CTU is reasonable and reduces the chance of incorrect billing.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes changes for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.004 and §64.004, which authorize the commission to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices by CTUs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004, and 64.004.

§26.33. *Prompt Payment Act.*

(a) Application. This section applies to billing by a certificated telecommunication utility (CTU) to a "governmental entity" as defined in Texas Government Code Chapter 2251, the Prompt Payment Act (PPA). This section controls over other sections of this chapter to the extent that they conflict.

(b) Time for payment by a governmental entity. A payment by a governmental entity shall become overdue as provided in the PPA.

(c) Disputed bills. If there is a billing dispute between a governmental entity and a CTU about any bill for CTU service, the dispute shall be resolved as provided in the PPA.

(d) Interest on overdue payment. Interest on an overdue governmental entity payment shall be calculated by the governmental entity pursuant to the terms of the PPA and remitted to the CTU with the overdue payment. However, pursuant to §26.27(a)(2) of this title (relating to Bill Payment and Adjustments), a governmental entity that is also an agency in any branch of government is not subject to a fee, penalty, interest, or other charge to the state for delinquent payment of a bill from a dominant certificated telecommunications utility.

(e) Notice. A CTU shall provide written notice to all of its non-residential customers of the applicability of the PPA to the CTU's service to governmental entities. This notice shall be completed within six months of the effective date of this section for existing non-residential customers and, within three months of the effective date of this section, shall be provided to a new customer at or before the time that the terms of service are provided to the customer. A CTU's failure to provide this notice does not give rise to any independent claim under the PPA, nor does this notice initiate or terminate any party's rights or obligations under the PPA.

(1) The failure of a CTU to provide written notice in accordance with this subsection may be considered in a PPA billing complaint.

(2) The failure of a governmental entity to inform the CTU of its status as a governmental entity may be considered in a PPA billing complaint.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005339

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Effective date: October 3, 2010

Proposal publication date: March 26, 2010

For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE

22 TAC §201.3

The Texas Funeral Service Commission (commission) adopts an amendment to §201.3, Complaints and Investigations, without changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6427).

The amendment is adopted to give affected persons notice of the process the commission follows in the processing of complaints; and to comply with the rulemaking requirements imposed by Texas Occupations Code, §651.202.

The commission received no comments on the proposed amendment.

The amendment is adopted under Texas Occupations Code, §651.152. The commission interprets §651.152 as authorizing it to adopt rules as necessary to administer Chapter 651.

No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 20, 2010.

TRD-201005443

O. C. "Chet" Robbins

Executive Director

Texas Funeral Service Commission

Effective date: October 10, 2010

Proposal publication date: July 23, 2010

For further information, please call: (512) 936-2469

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 216. CONTINUING COMPETENCY

22 TAC §216.1, §216.3

INTRODUCTION. The Texas Board of Nursing (Board) adopts amendments to §216.1 (relating to Definitions) and §216.3 (relating to Requirements) without changes to the proposed text published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6914) and will not be republished.

REASONED JUSTIFICATION. The adopted amendments are authorized under the Occupations Code §301.303 and §301.151 and are necessary to advance the Board's comprehensive approach to continuing competency in nursing.

The following paragraphs provide a brief summary and analysis of the reasons for the adopted rules, including a history of the

methodologies and initiatives supporting a comprehensive approach to continuing competency in Texas.

The Board has studied and evaluated continuing competency methodologies and national and local initiatives relating to continuing competency since 2006. The Board first began evaluating and testing models of continuing competency after Senate Bill (SB) 617, effective September 1, 1997, was enacted by the 75th Texas Legislature. SB 617 authorized the Board to conduct pilot programs to evaluate the continuing competency of nurses in Texas. Pursuant to SB 617, the Board approved and funded six pilot studies, including: (i) evaluation of a mandatory competency evaluation program of an urban county hospital and the validity and reliability of a 360 degree performance appraisal system in an urban specialty hospital; (ii) delineation of competencies for nurses working in rural health care settings; (iii) the use of vignettes for targeted continuing education in psychiatric nursing; (iv) assessment of certification in ACLS and PALS as a valid indication of competence; (v) identification and assessment of competencies of nurses in long-term care; and (vi) development of reliable and validity information for assessing home health nurse competencies. Various recommendations resulted from these studies, including a recommendation from the Competency Advisory Committee that acceptable components of competency maintenance should not be limited solely to continuing education hours. The Board reported its findings and recommendations regarding continuing competency in a 2000 publication, *Ensuring Professional Nursing Competency*. Shortly thereafter, ongoing competency evaluation began receiving further national attention and review.

For example, the National Council of State Boards of Nursing (NCSBN) formed a special task force to survey over 20,000 licensed vocational nurses and 20,000 registered nurses with at least one year of practice experience to determine competencies that were required in their work environments. The NCSBN also compiled state-by-state information about continued competency processes using the APPLE criteria (administratively feasible, publicly credible, professionally acceptable, legally defensible, and economically feasible) for an analysis of best practices among states. Around the same time, the following groups in Texas began evaluating and testing competency models: The Alliance for Innovation in Nursing Education; North Texas Consortium School of Nursing; Texas Higher Education Coordinating Board Nursing Innovative Grant Program - Midwestern State University High Fidelity Clinical Simulation; and Texas Nurses Association Competency Task Force (Task Force). In February, 2006, these groups formed the Texas Competency Consortium to share information and coordinate competency development in the state of Texas.

The Task Force focused on two specific approaches to continuing competency: (i) whether competencies should be developed that are related to a nurse's specific role/practice in his or her work environment; or (ii) whether broad-based competencies for all nurses should be developed. The NCSBN also considered these approaches on a national level, opting to develop and test a core set of broad-based competencies for all nurses. Ultimately, this approach was also adopted by the Task Force. The Task Force spent five years evaluating and testing different approaches to continuing competency. In July, 2008, the Task Force issued *Continuing Competency: Movement Toward Assurance in Nursing*, in which the Task Force outlined its recommendations for continuing competency requirements in Texas. Specifically, the Task Force recommended allowing nurses to meet their continuing competency requirements through either

the completion of 20 hours of continuing education in their area of practice or through national certification in their area of practice.

Although continuing competency has historically been demonstrated primarily through the completion of continuing education courses, the Board adopted rules in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5523) that authorized nurses to utilize other methods of demonstrating continuing competency, including the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice or the completion of an academic course meeting certain, specified criteria. The rules also authorized the completion of continuing education courses, and although the Board had proposed that such courses relate to a nurse's area of practice, no such requirement was adopted at that time, primarily due to concerns about the effect of such a requirement upon non-traditional nursing occupations and non-practicing nurses. The Board did, however, reiterate its commitment to adopting an "area of practice" requirement for continuing education courses in the future. Further, the Board charged the Nursing Practice Advisory Committee and the Advisory Committee on Education (Committees) to study, develop, and recommend a rule regarding the demonstration of continuing competency through continuing education in a nurse's area of practice and to consider its effect upon non-traditional nursing occupations.

The Committees

The Nursing Practice Advisory Committee and the Advisory Committee on Education (Committees) convened on May 17, 2010, to consider the Board's charge. Initially, some Committee members expressed concern that an "area of practice" requirement for continuing education courses might be too limiting or restrictive for nurses in non-traditional nursing occupations, such as nursing education or medical supply sales. Following a lengthy discussion of this issue, however, the majority of the Committee members ultimately agreed that the Board's application of an "area of practice" requirement would not necessarily narrow the range of continuing education courses that a nurse could complete to satisfy his or her continuing competency requirements. Further, the majority of the Committee members felt that an "area of practice" requirement for continuing education courses would only require a reasonable connection between a nurse's area of practice and a particular continuing education course. The Committees also discussed the potentially subjective nature of a Board audit of continuing education courses in a nurse's area of practice. The members recognized, however, that the Board's existing audit and appeals process was sufficient to provide a nurse an opportunity to defend his or her choice of completing a particular continuing education course. Several members expressed their belief that the Board should establish a minimum standard for continuing education courses, and should not rely on individual nurses to determine appropriate coursework for themselves, as many nurses wait to complete their continuing education hours on the last day of the reporting period and do not take courses that enhance their skills or provide opportunity for professional growth, but instead take courses that are available on-line and are as convenient as possible. Collectively, the Committees agreed that it was important to move towards a comprehensive continuing competency standard in continuing education, and despite a few possible growing pains associated with new requirements, an "area of practice" requirement was an important step in establishing meaningful standards in continuing competency. At the conclusion of the Committee's discussions, the Committees voted to

recommend the adoption of amendments to §216.1 and §216.3. The Board considered the Committee's recommendations and the proposed amendments to §216.1 and §216.3 at its July, 2010, meeting, and approved the proposal and adoption of the amendments.

The adopted amendments to §216.1 and §216.3 are intended to supplement the continuing competency rules that were adopted by the Board in August, 2009. The rules that were adopted in August, 2009, allow a nurse to choose among three methods of demonstrating continuing competency for each two-year licensing period. Under existing §216.3(a), a nurse may complete 20 contact hours of continuing education. Under existing §216.3(b), a nurse may achieve, maintain, or renew an approved national nursing certification in the nurse's area of practice. Finally, under existing §216.5, a nurse may attend an academic course that meets certain, prescribed criteria. The adopted amendments to §216.1 and §216.3 build upon this groundwork by requiring a nurse who chooses to complete continuing education courses to complete courses in his or her area of practice. While the Board recognizes that there is some benefit in continuing education courses that apply generally to all nursing practice, the Board has determined that there is more benefit in continuing education courses that apply to a nurse's specific area of practice. This is because a nurse is able to provide a better quality of care in the area of practice in which he or she is most knowledgeable. A nurse who enhances his or her expertise through practice specific continuing education courses is more likely to provide his or her patients with better care than a nurse who has not received the same specified training. For example, assume that a nurse who works in a cardiac unit completes a continuing education course relating to the use of technology in rhythm interpretations. When the nurse begins working in her cardiac unit later that week, her enhanced knowledge should better assist her in recognizing and interpreting variations in a patient's heart monitor readout. As a result, the nurse may be able to initiate medical interventions faster because she is able to recognize the subtle changes in the readout more quickly and accurately. In this way, the adopted amendments are anticipated to ensure a better quality of care for the public.

It should be noted in this example, however, that a nurse who works in a cardiac unit is not necessarily limited to such specialized continuing education courses under the adopted amendments. A cardiac nurse could complete continuing education courses covering a wider range of topics, provided that the courses are designed to enhance, enrich, and update the knowledge and skills she reasonably utilizes in her area of practice. Examples include courses related to patient assessment, kidney function, the healing environment, progressive care, diabetes, depression, medication administration, nutrition, the safety and efficacy of needleless IV access, nurse/patient interaction, pain management, and infection control, just to name a few. A cardiac nurse must be knowledgeable and skilled in all types of issues that may affect her patient care. Each of these courses contain information and material that is reasonably designed to enhance a cardiac nurse's ability to identify, recognize, and react to such issues. As such, a cardiac nurse could complete any of these courses in order to demonstrate her continuing competency. Further, this example is not meant to limit the types of continuing education courses that a cardiac nurse could complete under the adopted amendments. Any continuing education course in which a cardiac nurse learns about new technology or treatment regimens that are relevant to her practice area or any course which is designed to update or

enhance her clinical skills will meet the adopted requirements. The completion of such continuing education courses should result in a better quality of care for her patients because the information she receives as part of those continuing education courses directly relates to the issues she encounters regularly in her area of practice, and her skills and knowledge should better reflect a mastery of that information.

The Board anticipates that some nurses working in non-traditional nursing occupations, such as nursing administration, regulation, or education, may have questions about the kinds of continuing education courses that may relate to their specific area of practice. A continuing education course should incorporate and relate to the knowledge, skills, or activities performed or required by the nurse in his or her area of practice. A nursing educator, for example, must be knowledgeable and skilled in effectively teaching students about nursing practice. As such, a nurse educator could meet the adopted requirements by completing continuing education courses with general nursing applicability, such as courses in clinical assessment, medication administration, nursing documentation, and nursing laws and jurisprudence. A nurse educator could also complete more specialized continuing education courses, such as those related to patient advocacy, patient psychology, forensic nursing, medical coding and billing, or social work. Any course in which a nursing educator learns about new technology or treatment regimens or enhances his or her skills, so that he or she may then in turn teach and provide information regarding those regimens, treatments, and skills to his or her students, will meet the adopted requirements. The completion of such continuing education courses should result in a better quality of education for the nurse educator's students because the nurse educator has obtained new and enriching information that he or she may then pass on to his or her nursing students, which should result in more knowledgeable and better prepared nursing students.

The Board anticipates that many non-practicing nurses may also have concerns about the adopted requirements. Adopted §216.1(4) addresses those nurses who are no longer practicing nursing or who do not have a current area of practice but who maintain a current license. Adopted §216.1(4) also addresses volunteer retired nurses. Adopted §216.1(4) directs a nurse without a current area of practice to refer to his or her last area of practice or most recent area of practice in order to meet his or her continuing competency requirements. For example, a nurse who has not practiced nursing for several years, but who last practiced nursing in a community health clinic, could meet her continuing competency requirements by completing continuing education courses related to community health. Again, the adopted requirements will not limit the nurse to only those courses specifically designed for community health practitioners. Under the adopted amendments, the nurse could choose any continuing education course that is designed to enrich her clinical skills or teach her about new treatment regimens or technology that she could reasonably utilize in a community health setting. Because a community health nurse must be familiar and skilled in a wide array of issues affecting her patients, a wide range of continuing education courses could satisfy these requirements. Further, many nurses who have not practiced nursing for a significant period of time seek to re-enter active nursing practice in their last or most recent area of practice. Completing continuing education courses that specifically relate to that area of practice serves only to bolster the nurse's competency in that area of practice, which allows

the nurse to provide her patients with a more specialized and better quality of care.

Finally, the adopted amendments do not prohibit a nurse from completing additional continuing education courses that may be of interest to the nurse. A nurse may complete as many continuing competency activities as he or she chooses, so long as the minimum continuing competency requirements set forth in the Board's rules are met. Thus, a nurse could complete a continuing education course that may not relate to his or her area of practice if the nurse was interested in that course. Although the completion of that course could not be utilized to meet a portion of the nurse's continuing competency requirements, the adopted amendments do not prevent the nurse from choosing to complete extra or additional continuing competency activities.

HOW THE SECTIONS WILL FUNCTION. Adopted §216.1(4) defines "area of practice" as any activity, assignment, or task in which the nurse utilized nursing knowledge, judgment, or skills during the licensure renewal cycle. Further, adopted §216.1(4) provides that, if a nurse does not have a current area of practice, the nurse may refer to his or her last area of practice or most recent area of practice. Adopted §216.3(a) provides that a nurse must meet either the requirements of §216.3(a) or (b). Further, adopted §216.3(a) provides that a nurse may choose to complete 20 contact hours of continuing education within the two years immediately preceding renewal of registration in his or her area of practice. Additionally, these hours shall be obtained by participation in programs approved by a credentialing agency recognized by the Board. Further, adopted §216.3(a) provides that a list of these agencies/organizations may be obtained from the Board's office or web site.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One individual commenter states that, while it is much easier for her to breeze through a continuing education study related to the field she has been in for 25 years, she finds that it does not challenge her. The commenter states that she enjoys reading and testing herself in new areas. The commenter further states that she is not saying she is an expert in her field, but that it is like breathing to her.

Agency Response: The Board's mission is to protect the public health, safety, and welfare of the people of Texas. One way in which the Board is pro-actively seeking to ensure safer nursing practice in Texas is through the adopted amendments. Requiring nurses to complete continuing education in their area of practice helps ensure that they stay abreast of the most current nursing techniques, technologies, and treatments. While the Board appreciates that some nurses may be able to master continuing education activities in their areas of practice fairly easily, the Board is also aware that not every nurse will have that same experience. The adopted amendments establish a minimum standard for maintaining nursing competency, which is designed to increase the quality of nursing care provided to the people of Texas. Further, the Board reiterates that the adopted amendments do not prevent a nurse from completing additional continuing education courses that may be of specific interest to the nurse. A nurse may complete as many continuing competency activities as he or she chooses. Although the completion of a course that is not in a nurse's specific area of practice cannot be utilized to meet the nurse's continuing competency requirements, the adopted amendments do not prevent the nurse from choosing to complete the additional continuing competency activity.

Comment: The Texas Nurses Association (TNA) states that it believes that the proposed changes are a step toward helping ensure nurses maintain competency in their area of practice and that it will encourage nurses to be more selective in the continuing nursing education they take for maintaining their license. TNA also states that it believes that the proposed language regarding nurses who do not have a current "area of practice" may be difficult to administer. However, the proposed language does permit nurses with no current "area of practice" to maintain their license, which was the concern expressed about the previously proposed version of the rules. As such, TNA states that it supports adoption of the proposed changes.

Agency Response: The Board appreciates the comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: The Texas Nurses Association (TNA).

Against: None.

For, with changes: None.

Neither for nor against, without changes: One individual.

Neither for nor against, with changes: None.

STATUTORY AUTHORITY. The amendments are adopted under the Occupations Code §301.303 and §301.151. Section 301.303(a) authorizes the Board to recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and to require participation in continuing competency programs as a condition of renewal of a license. The programs may allow a license holder to demonstrate competency through various methods, including completion of targeted continuing education programs and consideration of a license holder's professional portfolio, including certifications held by the license holder. Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Section 301.303(c) authorizes the Board by rule to establish a system for the approval of programs and providers of continuing education if the Board requires participation in continuing education programs as a condition of license renewal. Section 301.303(e) authorizes the Board to adopt other rules as necessary to implement §301.303. Section 301.303(f) states that the Board may assess each program and provider under §301.303 a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers. Section 301.303(g) authorizes the Board by rule to establish guidelines for targeted continuing education required under Chapter 301. The rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under this chapter; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 14, 2010.

TRD-201005341

Jena Abel

Assistant General Counsel

Texas Board of Nursing

Effective date: October 4, 2010

Proposal publication date: August 13, 2010

For further information, please call: (512) 305-6822



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 5. POISON CONTROL CENTERS

25 TAC §5.51, §5.52

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §5.51 and §5.52, concerning poison control centers, without changes to the proposal as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4574), and the sections will not be republished.

BACKGROUND AND PURPOSE

Chapter 347 (House Bill 1093), 81st Legislature, Regular Session, 2009, amends Health and Safety Code, Chapters 771 and 777, and transfers the administrative oversight of the Texas Poison Center Network from the department to the Commission on State Emergency Communications (CSEC). Section 11 of Chapter 347 requires that any rules in existence before Chapter 347 continue in effect until amended or replaced by the CSEC. On May 1, 2010, all program functions and activities were transferred to the CSEC and a new rule, 1 TAC §254.2, became effective on May 4, 2010.

SECTION-BY-SECTION SUMMARY

The repeal of §5.51 and §5.52 is necessary for the transfer of administrative oversight of the Texas Poison Center Network from the department to the CSEC under authorization of Health and Safety Code, Chapters 771 and 777.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

Language in Health and Safety Code, §777.001(b), granting the department and the Commission on State Emergency Communications the authority to "jointly" adopt rules was repealed effective September 1, 2009, by Chapter 347 (House Bill 1093), 81st Legislature, Regular Session, 2009, Section 4. However, §11(c) of that legislation recites: "During the period beginning on September 1, 2009, and ending on April 30, 2010 . . . the Department of State Health Services shall continue to perform functions and activities relating to regional poison control centers under the Health and Safety Code or other law as if the law had not been amended or repealed . . . and the former law is continued in effect for that purpose." The Executive Commissioner of the Health and Human Services Commission, on behalf of the department is, therefore, authorized to repeal these rules. The repeals are also authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005419

Lisa Hernandez
General Counsel

Department of State Health Services

Effective date: October 7, 2010

Proposal publication date: June 4, 2010

For further information, please call: (512) 458-7111 x6972



CHAPTER 38. CHILDREN WITH SPECIAL HEALTH CARE NEEDS SERVICES PROGRAM

25 TAC §§38.1 - 38.16

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§38.1 - 38.12, 38.14, and 38.16, the repeal of §38.13, and new §38.13 and §38.15, concerning the Children with Special Health Care Needs (CSHCN) Services Program. The amendments to §38.4 and §38.16 and new §38.13 are adopted with changes to the proposed text as published in the May 7, 2010, issue of the *Texas Register* (35 TexReg 3593). The amendments to 38.1 - 38.3, 38.5 - 38.12, and 38.14, the repeal of §38.13, and new §38.15 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

As authorized by Health and Safety Code, Chapter 35, the CSHCN Services Program provides services to children younger than 21 years of age who have a chronic physical or developmental condition, or to eligible clients with cystic fibrosis regardless of age.

The amendments, repeal, and new sections strengthen and update information, revise and delete language, and make gram-

matical corrections to improve flow, accuracy, and consistency in the rules.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). Sections 38.1 - 38.14 and 38.16 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The following changes to names and addresses have been made throughout §§38.1 - 38.12, 38.14, and 38.16. References to the department's name have been changed from "Texas Department of Health" to "Department of State Health Services," and the address for all correspondence has been changed from "1100 West 49th Street, Austin, Texas 78756" to "Mail Code 1938, P.O. Box 149347, Austin, Texas 78714-9347."

Amendments to §§38.1, 38.5, 38.11, 38.12, 38.14, and 38.16, and new §38.13 revise the name of the program as currently used, clarify existing language, and increase readability.

Amendments to §38.2 add new definitions, delete one definition, and update the definitions of other terms used within the rules. The paragraphs have been renumbered accordingly.

Amendments to §38.3 clarify the CSHCN Services Program eligibility requirements.

Amendments to §38.4 modify and update language concerning benefits and limitations and revise references to reimbursements for services.

Amendments to §38.6 revise general requirements for program participation, actions affecting provider enrollment, provider types, requirements for specialty centers, and out-of-state coverage.

Amendments to §38.7 clarify that all freestanding ambulatory surgical centers must apply for program approval and must comply with state licensure requirements and Medicare certification standards.

Amendments to §38.8 revise criteria for approval of inpatient rehabilitation centers.

Amendments to §38.9 clarify existing language, increase readability, and revise the section title concerning cleft-craniofacial services.

Amendments to §38.10 modify existing language and revise specific reimbursement amounts for payment of services.

New §38.15 authorizes the program or the program's designee to recover the cost of services provided to a client from a person who does not pay or from any third party who has a legal obligation to pay other benefits. New §38.15 limits the program's right of recovery to the cost of the covered services provided to treat the client's specific condition or injury that was caused by a liable third party and also authorizes the program or the program's designee to waive all or part of the program's right to recover from a liable third party in certain specific circumstances.

COMMENTS

The department, on behalf of the commission, did not receive any public comments concerning the proposal during the comment period.

Minor revisions were included in §38.4(b)(3)(D) to clarify the scope of providers who can perform podiatric services; in §38.13(a)(7) and (8) to clarify the time period which requests for administrative review must be received by the program; and in §38.16(b)(2)(C)(i) for grammatical changes.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments and new rules are authorized by Government Code, §531.0055(e), and Health and Safety Code, §§35.003, 35.004, 35.005, 35.006, and §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§38.4. Covered Services.

(a) Introduction. The program provides no direct medical services, but reimburses for services rendered by program providers or contractors. Clients must receive services as close to their home communities as possible unless program contracts or policies require treatment at specific facilities or specialty centers or the clients' conditions require specific specialty care.

(b) Types of service.

(1) Early identification. The program may conduct outreach activities to identify children for program enrollment, increase their access to care, and help them use services appropriately. Outreach services may include, but are not limited to:

(A) promotion of the program to the general public or targeted to potential clients and providers;

(B) development and distribution of educational materials to assist applicants and clients in the access and use of program services;

(C) development and distribution of population-based educational materials concerning children with special health care needs;

(D) integration with programs which screen for or provide treatment of newborn congenital anomalies or other specialty care; and

(E) links with community, regional, or school-based clinics to identify, assess needs, and provide appropriate resources for children with special health care needs.

(2) Diagnosis and evaluation services. These services may be covered for the purpose of determining whether an applicant meets the program definition of a child with special health care needs in order to receive health care benefits. Diagnosis and evaluation services must be prior authorized and coverage is limited in duration. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the applicant meets the definition of a "child with special health care needs" and the applicant meets all other eligibility criteria, then the applicant may be given up to 60 days of program coverage for diagnosis and evaluation services only. The program medical director or other designated medical staff may prior authorize limited coverage of diagnosis and evaluation services for waiting list clients if needed

to help determine "urgent need for health care benefits" as described in §38.16(e) of this title (relating to Procedures to Address Program Budget Alignment). Only program providers may be reimbursed for diagnosis and evaluation services.

(3) Rehabilitation services. Rehabilitation services means a process of physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic or rehabilitative services: facility care, medical and dental care, occupational, speech, and physical therapies, the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, other medical supplies, and other services specified in this chapter. To be eligible for program reimbursement, treatment must be for a client and must have been prescribed by a provider in compliance with all applicable laws and regulations of the State of Texas. Services may be limited and the availability of certain services described in the following subparagraphs is contingent upon implementation of automation procedures and systems.

(A) Medical assessment and treatment. Physicians must provide medical assessment and treatment services, including medically necessary laboratory and radiology studies. Other practitioners must be licensed by the State of Texas, enrolled as providers in the program, and practicing within the scope of their respective licenses or registrations.

(B) Outpatient mental health services. Outpatient mental health services are limited to no more than 30 encounters in a calendar year by all professionals licensed to provide mental or behavioral health services including psychiatrists, psychologists, licensed clinical social workers (LCSW), licensed marriage and family therapists, and licensed professional counselors per eligible client per calendar year. Coverage includes, but is not limited to psychological or neuropsychological testing, psychotherapy, and counseling.

(C) Preventive and therapeutic dental services (including oral and maxillofacial surgery). Preventive and therapeutic dental services must be provided by licensed dentists enrolled to participate in the program. Coverage for therapeutic dental services, including prosthetics and oral and maxillofacial surgery, follows the Texas Medicaid program guidelines. Orthodontic care must be prior authorized and may be provided only for CSHCN eligible clients with diagnoses of cleft-craniofacial abnormalities, dentofacial abnormalities, or late effects of fractures of the skull and face bones.

(D) Podiatric services. Podiatric services must be provided by licensed providers enrolled to participate in the program. Podiatrists are limited to services medically necessary to treat conditions of the foot and ankle. Podiatric services follow the Texas Medicaid program guidelines. Supportive devices, such as molds, inlays, shoes, or supports, must comply with coverage limitations for foot orthoses.

(E) Treatment in program participating facilities. Non-emergency hospital care must be provided in facilities that are enrolled as program providers. The length of stay is limited according to diagnosis, procedures required, and the client's condition.

(i) Inpatient hospital care, coverage limitations, and inpatient psychiatric care.

(I) Inpatient hospital care. Coverage excludes the following:

(-a-) maternity care, newborn care, infertility treatment, or other reproductive services unless directly related to a covered chronic physical or developmental condition;

(-b-) personal comfort items, such as television or newspaper delivery; and

(-c-) private duty nursing or attendant care.

(II) Coverage limitations. Coverage is limited to 60 days per calendar year except for stem cell transplantation, for which coverage is available for 120 days per calendar year.

(III) Inpatient psychiatric care. Coverage is limited to inpatient assessment and crisis stabilization and is to be followed by referral to an appropriate public or private mental health program. Admission must be prior authorized. Services include those medically necessary and furnished by a Medicaid psychiatric hospital or facility under the direction of a psychiatrist.

(ii) Inpatient rehabilitation care. Medically necessary inpatient rehabilitation care is limited to an initial admission not to exceed 30 days based on the functional status and potential of the client as certified by a physician participating in the program. Services beyond the initial 30 days may be approved by the program based upon the client's medical condition, plan of treatment, and progress. Payment for inpatient rehabilitation care is limited to 90 days during a calendar year.

(iii) Ambulatory surgical care. Ambulatory surgical care is limited to the medically necessary treatment of a client and may be performed only in program approved ambulatory surgical centers as defined in §38.7 of this title (relating to Ambulatory Surgical Care Facilities).

(iv) Emergency care. Care including, but not limited to hospital emergency departments, ancillary, and physician services, is limited to medical conditions manifested by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in placing the client's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. If a client is admitted to a non-participating program hospital provider following care in that provider's emergency room and the admitting facility declines to enroll or does not qualify as a program provider, the client must be discharged or transferred to a program provider as soon as the client's medical condition permits. All providers must enroll in order to receive reimbursement.

(v) Care for renal disease. Renal dialysis is limited to the treatment of acute renal disease or chronic (end stage) renal disease through a renal dialysis facility and includes, but is not limited to dialysis, laboratory services, drugs and supplies, declothing shunts, on-site physician services, and appropriate access surgery. Renal transplants may be covered in approved renal transplant centers if the projected cost of the transplant and follow-up care is less than that of continuing renal dialysis. Estimated cost of the renal transplant over a one-year period versus the cost of renal dialysis for one year at their facility must be documented. For each client 18 years of age and older, the transplant team must also provide a plan of care to be implemented after the client reaches 21 years of age and is no longer eligible for program services. Renal transplants must be prior authorized, and approval is subject to the availability of funds.

(F) Orthotic and prosthetic devices. Orthotic and prosthetic devices must be prescribed by a practitioner licensed to do so and supplied by an orthotist or prosthetist licensed by the State of Texas.

(G) Medications. Outpatient medications available through pharmacy providers, including over-the-counter products, must be prescribed by practitioners licensed to do so.

(H) Nutrition services and nutritional products, excluding hyperalimentation and total parenteral nutrition (TPN).

(i) Nutrition services. Nutrition services must be prescribed by a practitioner licensed to do so.

(ii) Nutritional products. Nutritional products, including over-the-counter products, are limited to those covered by the program and prescribed by a practitioner licensed to do so, for the treatment of an identified metabolic disorder or other medical condition and serving as a medically necessary therapeutic agent for life and health or when part or all nutritional intake is through a tube.

(I) Hyperalimentation and Total Parenteral Nutrition (TPN) Services. Services include, but are not limited to solutions and additives, supplies and equipment, customary and routine laboratory work, enteral supplies, and nursing visits. These services may be provided on a daily basis when oral intake cannot maintain adequate nutrition. Covered services must be reasonable, medically necessary, appropriate, and prescribed by a practitioner licensed to do so.

(J) Medical foods. Coverage for medical foods is limited to the treatment of inborn metabolic disorders. Treatment for any other condition with medical foods requires documentation of medical necessity and prior authorization.

(K) Durable medical equipment. All equipment must be prescribed by a practitioner licensed to do so. Some equipment may be ordered from a specific supplier.

(L) Medical supplies. Supplies must be medically necessary for the treatment of an eligible client.

(M) Professional vision services. Vision services medically necessary for the treatment of a client include, but are not limited to:

(i) medically necessary eye examinations with refraction for diagnoses of refractive error, aphakia, diseases of the eye, or eye surgery;

(ii) one eye examination with refraction for the purpose of obtaining eyewear during a calendar year; and

(iii) one pair of non-prosthetic eye wear per calendar year prescribed by a practitioner licensed to do so.

(N) Speech-language pathology and audiology. Speech-language pathology and audiology services medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a speech-language pathologist or audiologist licensed by the State of Texas. Program coverage of speech-language pathology and audiology services may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the client is eligible for services for which a school district is legally responsible.

(O) Hearing services include, but are not limited to, hearing screening, audiological assessment, otological examination, hearing aid evaluation, hearing aid devices, hearing aid fitting and repair, hearing aid batteries and supplies, and ear molds.

(P) Occupational and physical therapy. Occupational and physical therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a therapist licensed by the State of Texas. Program coverage of physical and occupational therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the client is eligible for services for which a school district is legally responsible.

(Q) Certified respiratory care practitioner services. Respiratory therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a certified respiratory care practitioner. Program coverage of

respiratory therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the client is eligible for services for which a school district is legally responsible.

(R) Home health nursing services. Home health nursing services must be medically necessary, be prescribed by a physician, and be provided only by a licensed and certified home and community support services agency participating in the program. Home health nursing services are limited to 200 hours per client per calendar year. Up to 200 additional hours of service per client per calendar year may be approved with documented justification of need and cost effectiveness.

(S) Hospice care. Hospice care includes palliative care for clients with a presumed life expectancy of six months or less during the last weeks and months before death. Services apply to care for the hospice terminal diagnosis condition or illnesses. Treatment for conditions unrelated to the terminal condition or illnesses is unaffected. Hospice care must be prescribed by a practitioner licensed to do so who also is enrolled as a program provider.

(4) Care management.

(A) Medical home. Each program client should receive care in the context of a medical home.

(i) Comprehensive, coordinated health care of infants, children, and adolescents should encompass the following services:

(I) provision of preventive care, including but not limited to, immunizations, growth and development assessments, appropriate screening health care supervision, client and parental counseling about health care supervision, and client and parental counseling about health and psychological issues;

(II) assurance of ambulatory and inpatient care for acute illness, 24 hours a day, seven days a week (including after hours and weekends);

(III) provision of care over an extended period of time to enhance continuity;

(IV) identification of the need for sub-specialty consultation and referrals, provision of medical information about the client to the consultant, evaluation of the consultant's recommendations, implementation of recommendations that are indicated and appropriate, and interpretation of the consultant's recommendations for the family;

(V) interaction with school and community agencies to assure that the special health needs of the client are addressed;

(VI) guidance and assistance needed to make the transition to all aspects of adult life, including adult health care, work, and independence; and

(VII) maintenance of a central record and database containing all pertinent medical information about the client including information about hospitalizations.

(ii) The CSHCN Services Program may require periodic reports from the medical home.

(B) Case management. Case management services may be made available to program clients through public health regional offices or other resources to assist clients and their families in obtaining adequate and appropriate services to meet the client's health and related services needs. The program will make available case management as needed or desired to all clients who are eligible for health care benefits (includes clients who are on the waiting list for health care benefits).

The program also may make available case management services to clients who are not eligible for the program's health care benefits.

(5) Family support services. Family support services include disability-related support, resources, or other assistance and may be provided to the family of a client with special health care needs.

(A) Eligibility. A client is eligible to receive family support services if:

(i) the client is not receiving services from a Medicaid waiver program, and the family support needs cannot be met by services from other family support programs, such as the Department of Aging and Disability Services or the In-Home and Family Support Program; and

(ii) the client's family collaborates with the assigned case manager to identify and pursue other sources of support and to develop a family assessment and service plan.

(B) Processing and evaluation of requests.

(i) Families of clients indicate their need for family support services by completing and signing an approved request form.

(ii) Requests for family support services are processed in chronological order by the date of the request.

(iii) All requests for family support services must be prior authorized (approved by the program prior to delivery).

(iv) While there is a waiting list for health care benefits, limitations in reimbursement or prior authorization may be instituted as provided in §38.16 of this title.

(v) Some services or items may require a written statement from a physician, physical therapist, occupational therapist, or other healthcare professional to establish the disability-related nature of the request.

(vi) Some services or items may require written bids.

(vii) Persons requesting assistance are responsible for collaborating with their case managers to obtain information as necessary so that an accurate determination can be made in a timely manner.

(viii) Families shall be notified in writing of the outcome of their requests for family support services.

(ix) Families have the right to appeal a denial or partial approval as described in §38.13 of this title (relating to Right of Appeal).

(C) Service plan and cost allowances.

(i) The case manager and the client or family must develop a family assessment and service plan and complete a Family Support Services request packet to request a prior authorization for family support services.

(ii) The program may establish annual cost allowances based upon the client's or family's level of assessed need for family support services not to exceed:

(I) lifetime benefit of up to \$3,600 per eligible client for minor home modifications; and

(II) annual benefit of up to \$3,600 per calendar year per eligible client for allowable family support services.

(-a-) The annual benefit may increase to no more than \$7,200 per eligible client for the purchase of vehicle lifts and modifications.

(-b-) The lifetime benefit for minor home modifications and the annual benefit may be used in the same calendar year.

(iii) Service plan cost allowances may be prorated for plans that cover less than one calendar year.

(iv) Reimbursement:

(I) may be made to the family or to the vendor enrolled as a program provider; and

(II) may be reduced by the amount of a cost-sharing requirement, if applicable.

(v) Reimbursement rates for respite providers are established by the client or family and the selected provider in collaboration with the case manager.

(vi) The annual family assessment and service plan may be amended at any time, but must be reevaluated by the client or family and case manager at least annually.

(D) Allowable services.

(i) Family support services for program clients and their families include those allowable services and items that:

(I) are above and beyond the scope of usual needs (i.e., basic clothing, food, shelter, medical care, and education);

(II) are necessitated by the client's medical condition or disability; and

(III) directly support the client's living in his or her natural home and participating in family life and community activities.

(ii) Family support services may not be used to supplant services available through other public or private programs, but may be used to supplement services provided by other programs.

(iii) Allowable services include:

(I) respite care;

(II) specialized child care costs for a client that are expenses directly related to the client's disability and special needs that are beyond the scope of community-based child care centers, including specialized training for the child care provider;

(III) counseling, training programs, or conferences to obtain specific skills or knowledge related to the client's care that assists family members or caregiver(s) in maintaining the client in their home and to increase their knowledge and ability to care for the client;

(IV) minor home modifications such as installation of a ramp, widening of doorways, bathroom modifications, and other home modifications to increase accessibility and safety;

(V) vehicle lifts and modifications, such as wheelchair lifts or ramps, wheelchair tie-downs, occupant restraints, accessories, modifications such as raising roofs or doors if necessary for lift installation or usage, hand controls, and repairs of covered modifications not related to inappropriate handling or misuse of equipment and not covered by other resources;

(VI) specialized equipment, including porch or stair lifts, air purification systems or air conditioners, positioning equipment, bath aids, supplies prescribed by licensed practitioners that are not covered through other systems, and other non-medical disability-related equipment that assists with family activities, promotes the client's self-reliance, or otherwise supports the family; and

(VII) other disability-related services that support permanency planning, independence, or participation in family life and integrated or inclusive community activities.

(E) Unallowable services. Family support funds may not be used to provide those services that do not relate to the client's disability and do not directly support the client's living in his or her natural home and participating in family life and integrated or inclusive community activities. Examples of unallowable services include, but are not limited to:

(i) items for which a less expensive alternative of comparable quality is available;

(ii) purchase or lease of vehicles or vehicle maintenance and repair;

(iii) home mortgage or rent expenses or basic home maintenance and repair;

(iv) income taxes;

(v) medical services;

(vi) services in segregated settings other than respite facilities or camps;

(vii) insurance premiums;

(viii) death benefits, burial policies, and funeral expenses;

(ix) costs for allowable services incurred before the requested family support service is prior authorized;

(x) non-medical foods, routine shelter, routine utilities, routine home repairs, routine home appliances, routine furnishings, fences, and yard work;

(xi) medical benefit items or services paid for or reimbursed by private insurance, Medicaid, Medicare, CHIP, the CSHCN Services Program or other health insurance programs for which the client is eligible;

(xii) services, equipment, or supplies that have been denied by Medicaid, CHIP, or the program because a claim was received after the filing deadline, because insufficient information was submitted, or because an item was considered inappropriate or experimental;

(xiii) over-the-counter or prescription medications;

(xiv) architectural modifications to a public facility;

(xv) school tuition or fees, or equipment, items, or services that should be provided through the public school system;

(xvi) items that could endanger the health and safety of the client;

(xvii) routine child care;

(xviii) computers and software unless for use as an assistive technology device or necessary to perform a critical or essential function, such as environmental control or written or oral communication, which the client is unable to perform without the computer;

(xix) services provided by an individual under the age of 18 years or by the client's parent(s), guardian, or other member of the client's household;

(xx) services exclusively to support the care of siblings or other members of the client's household, but which are not necessary to meet the medical needs of the client;

(F) Reduction or termination of services. Reasons for terminating or reducing family support services may include, but are not limited to:

(i) the client no longer meets the eligibility criteria for the program;

(ii) services available through the program are discontinued due to budget restrictions;

(iii) While there is a waiting list for health care benefits, limitations in reimbursement or prior authorization may be instituted as provided in §38.16 of this title;

(iv) the client's family indicates that the need for family support services no longer exists;

(v) the client moves out of Texas;

(vi) the client is placed in a nursing facility or other institutional setting for an indefinite period of time;

(vii) the client dies;

(viii) the client's designated case manager is unable to locate the client and family; or

(ix) the family knowingly does not comply with the family assessment and service plan in which case the family may also be liable for restitution.

(6) Other types of services. The following services also are available through the program.

(A) Ambulance services. Emergency ground, non-emergency ground and air ambulance services are covered for the medically necessary transportation of a client. Non-emergency ambulance transport is covered if the client cannot be transported by any other means without endangering the health or safety of the client and when there is a scheduled medical appointment for medically necessary care at the nearest appropriate facility. Transportation by air ambulance is limited to instances when the client's pickup point is inaccessible by land or when great distance interferes with immediate admission to the nearest appropriate medical treatment facility. Transports to out-of-locality providers are covered if a local facility is not adequately equipped to treat the client. Out-of-locality refers to one-way transfers 50 miles or more from point of pickup to point of destination.

(B) Transportation. The program may provide transportation for a client and, if needed, a responsible adult, to and from the nearest medically appropriate facility (in Texas or in the United States 50 or fewer miles from the Texas border) to obtain medically necessary and appropriate health care services that are within the scope of coverage of the program and are provided by a program enrolled provider. The lowest-cost appropriate conveyance should be used. The program shall not assist if transportation is the responsibility of the client's school district or can be obtained through Medicaid. Transportation to out-of-state services located more than 50 miles from the Texas border will not be approved except as specified in §38.6(e) of this title (relating to Providers).

(C) Meals and lodging. The program may provide meals and lodging to enable a parent, guardian, or their designee to obtain inpatient or outpatient care for a client at a facility located away from their home. The reason for the inpatient or outpatient visit must be directly related to medically necessary treatment for the client that is provided by program enrolled providers and covered by the program. Meals and lodging associated with travel to services that are provided more than 50 miles from the Texas border will not be approved except as specified in §38.6(e) of this title.

(D) Transportation of deceased. The program may provide the following services:

(i) transportation cost for the remains of a client who expires in a program-approved facility while receiving program health care benefits, if the client was not in the family's city of residence in Texas, and the transportation cost of a parent or other person accompanying the remains from the facility to the place of burial in Texas that is designated by the parent or other person legally responsible for interment;

(ii) embalming of the deceased if required by law for transportation;

(iii) a coffin meeting minimum requirements if required by law for transportation; and

(iv) any other necessary expenses directly related to the care and return of the client's remains.

(E) Payment of insurance premiums, coinsurance, co-payments, and deductibles. The program may pay public or private health insurance premiums to maintain or acquire a health benefit plan or other third party coverage for the client, and if paying for such health insurance can reasonably be expected to be cost effective for the program. The program may pay for coinsurance and deductible amounts when the total amount paid (including all payers) to the provider does not exceed the amount allowed by the program for the covered service. The program may reimburse clients for co-payments paid for covered services. The program will not pay premiums, deductibles, coinsurance, or co-payments for clients enrolled in CHIP.

(c) Services not covered. Services which are not covered by the program even though they may be medically necessary for and provided to a client include, but are not limited to:

(1) treatments which are considered experimental or investigational;

(2) chiropractic services;

(3) care for premature infants;

(4) care for alcohol or substance abuse;

(5) pregnancy prevention, except when medically necessary for the specific treatment of a condition meeting the parameters of the "child with special health care needs" definition;

(6) maternity care services specific to routine pregnancy care, labor and delivery, and maternal post-partum care;

(7) infertility treatment;

(8) services provided by a nursing home or facility; and

(9) services provided while the client is in the custody of or incarcerated by any municipal, county, state, or federal governmental entity. Case management or prior approved family support services not provided by the governmental entity that are needed during the time when a client is transitioning from custody or incarceration into a community living setting may be covered.

(d) Authorization and prior authorization of selected services.

(1) Provider's responsibility. A program provider must request services in specific terms on department-prepared forms so that an authorization may be issued and sufficient monies encumbered to cover the cost of the service. If a service is authorized, payment may be made to the provider as long as the service is not covered by a third party resource and all billing requirements are met. Program authorization should not be considered an absolute guarantee of payment. Once a service is delivered and if the service requires authorization for

payment, the authorization request for that service must be submitted within 95 days of the date of service.

(2) Required prior authorization for selected services. At the program's option, selected services may require authorization prior to the delivery of services in order for payment to be made. Prior authorization requests must be submitted prior to the date of service.

(3) While there is a waiting list for health care benefits, limitations in reimbursement or prior authorization may be instituted as provided in §38.16 of this title.

(4) Denied authorization requests are authorization requests which are incomplete, submitted on the wrong form, lack necessary documentation, contain inaccurate information, fail to meet authorization request submission deadlines, are for ineligible persons, services, or providers, or are for clients who do not qualify for the health care benefit requested. Denied authorization requests may be corrected and resubmitted for reconsideration. Authorization requests must meet authorization request submission deadlines. Denied authorization requests may be appealed according to §38.13 of this title.

(e) Pilot projects. The program may initiate and participate in pilot projects. New projects are possible only if funds are available in the current fiscal year. All pilot projects are limited to no more than 10% of the fiscal year appropriation.

§38.13. Right of Appeal.

(a) Administrative review.

(1) If the program denies eligibility to a program applicant, the program shall give the applicant written notice of the denial and the applicant's right to request an administrative review of the denial within 30 days of the date of the notification.

(2) If the program proposes to modify, suspend, or terminate a client's eligibility for health care benefits (unless such program actions are authorized by §38.16 of this title (relating to Procedures to Address Program Budget Alignment)), the program shall give the client written notice of the proposed action and the client's right to request an administrative review of the proposed action within 30 days of the date of notification.

(3) If the program denies a prior-authorization or authorization request for program services, the program shall give the client and provider written notice of the denial and the right of the client or provider to request an administrative review of the denial within 30 days of the date of notification.

(4) A client, family, or provider may not request administrative review of the program's denial of a prior-authorization or authorization request for program services or reduced provider reimbursement amounts that are authorized by §38.16 of this title.

(5) If the program denies a provider's claim that has been corrected and resubmitted for reconsideration according to §38.10(1)(B)(ii) of this title (relating to Payment of Services), the program shall give the provider written notice of the denial. The provider has the right to request an administrative review of the denial within 30 days of the date of notification.

(6) If the program denies or proposes to modify, suspend, or terminate an individual provider's participation in the program, the program shall give the provider written notice of the proposed action and the provider's right to request an administrative review of the proposed action within 30 days of the date of notification.

(7) If the program receives a written request for administrative review within 30 days of the date of the notification, the program shall conduct an administrative review of the circumstances surround-

ing the proposed action. The program shall give the applicant, client, family, or provider written notice of the program decision and the supporting reasons for the decision within 30 days of receipt of the request for administrative review.

(8) If the program does not receive a written request for administrative review within 30 days of the date of the notification, the applicant, client, family, or provider is presumed to have waived the administrative review as well as access to a fair hearing, and the program's action is final.

(b) Fair hearing. If the applicant, client, family, or provider is dissatisfied with the program's decision and supporting reasons following the administrative review, the applicant, client, family, or provider may request a fair hearing in writing addressed to the Children with Special Health Care Needs Services Program, Purchased Health Services Unit, MC 1938, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347 within 20 days of receipt of the administrative review decision notice. If the applicant, client, family, or provider fails to request a fair hearing within the 20-day period, the applicant, client, family, or provider is presumed to have waived the request for a fair hearing, and the program may take final action. A fair hearing requested by an applicant, client, family, or provider shall be conducted in accordance with §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

§38.16. Procedures to Address Program Budget Alignment.

(a) The department shall analyze actuarial cost projections concerning program administrative and client services to estimate the amount of funds needed in the fiscal year by the program to serve program clients and shall monitor such program cost projections and funding analyses at least monthly to determine whether the estimated amount of funds needed by the program will:

(1) exceed the program's appropriated funds and other available resources for the fiscal year; or

(2) be less than the program's appropriated funds and other available resources for the fiscal year.

(b) When the program projects that the estimated amount of funds needed in the fiscal year by the program to serve program clients will exceed the program's appropriated funds and other available resources for the fiscal year, the program shall use the following methodology to reduce or limit the amount of funds to be expended by the program:

(1) give clients and providers who will be directly affected written notice of any reductions or limitations of services, coverage, or reimbursements;

(2) take the following actions in the order listed only until the projected amount of funds to be expended by the program approximately equals, but does not exceed, the program's appropriated funds and other available resources:

(A) implement administrative efficiencies while avoiding changes which may jeopardize the quality and integrity of the program service delivery;

(B) establish and administer a waiting list for health care benefits according to the procedures in this section;

(C) at the same time the waiting list is established, the program shall:

(i) provide only limited prior authorization for family support services for ongoing clients, as determined by the medical director or other designated medical staff, only in order to continue services already being provided at the time the waiting list is established,

when the specific services are required to prevent out-of-home placement of the client (as documented by the program regional case management staff or contractors), or when the provision of such services is cost effective for the program;

(ii) disallow prior authorization (coverage) of diagnosis and evaluation services for applicants who qualify for up to 60 days of program coverage for diagnosis and evaluation services only and refer such applicants to case management services; and

(iii) allow limited prior authorization of diagnosis and evaluation services on a short-term basis only when such information is needed to assess whether clients on the waiting list have "urgent need for health care benefits" as described in subsection (e) of this section and only with prior authorization and approval by the medical director or other designated medical staff.

(D) place new applicants or re-applicants with lapsed eligibility who are determined eligible for program health care benefits (new clients for health care benefits) on the waiting list. These clients will be ordered on the waiting list according to the date and time the client is determined eligible for program health care benefits;

(E) reduce or limit reimbursements for contractual service providers while avoiding changes which may jeopardize the integrity of the contractor base and thereby decrease client access to services;

(F) place clients who are eligible to receive program health care benefits and who currently are not on the waiting list (ongoing clients for health care benefits) on the waiting list. These clients will be ordered on the waiting list according to the original date and time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following order of movement to the waiting list:

(i) ongoing clients for health care benefits who have one or more sources of substantial health insurance coverage (such as Medicaid, CHIP, or other private health insurance similar in scope) in addition to the CSHCN Services Program (not including those ongoing clients for whom the program pays the insurance premiums);

(ii) ongoing clients for health care benefits in the following order by age groups: 21 years of age or older, 20 years of age, 19 years of age, 18 years of age; and

(iii) all other ongoing clients for health care benefits who do not have an urgent need for health care benefits;

(G) employ additional measures to reduce or limit the amount of funds to be expended by the program as directed by rule.

(c) If the procedures described in subsection (b)(2)(A) - (G) of this section enable the program to project that the estimated amount of funds to be expended by the program in the fiscal year approximately equals, but does not exceed, the program's appropriated funds and other available resources, the program shall take the following additional steps in order to provide health care benefits to as many clients with urgent need for health care benefits as possible who are currently on the waiting list.

(1) generate cost savings by taking the following steps in the order listed:

(A) give clients and providers who will be directly affected written notice of any reductions or limitations of services, coverage, or reimbursements;

(B) reduce or limit reimbursements for contractual service providers while avoiding changes which may jeopardize the in-

tegrity of the contractor base and thereby decrease client access to services; and

(C) employ additional measures to generate cost savings as directed by rule.

(2) utilize cost savings generated to remove as many clients with urgent need for health care benefits as possible from the waiting list and provide health care benefits to those clients. Clients with urgent need for health care benefits will be removed from the waiting list according to the original date and time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(A) clients who are less than 21 years old and who have an urgent need for health care benefits as described in subsection (e) of this section;

(B) clients who are 21 years of age or older and who have an urgent need for health care benefits as described in subsection (e) of this section;

(3) provide health care benefits (which may or may not include coverage of outstanding bills for health care benefits) for clients with urgent need for health care benefits who are removed from the waiting list;

(A) as long as program cost savings funds are available; and

(B) if the outstanding bills for health care benefits are for dates of service that are within the time period that program cost savings funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;

(4) provide limited health care benefits or payment of outstanding bills for health care benefits for clients with urgent need for health care benefits who are on the waiting list and remain on the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the parameters set forth in subsection (b)(2)(C)(i) of this section. Clients with urgent need for health care benefits who are on the waiting list will be served in the same order used in paragraph (2) of this subsection to remove clients with urgent need for health care benefits from the waiting list. This coverage may be provided to clients with urgent need on the waiting list prior to or at any point during activities described by paragraphs (2) - (3) of this subsection only:

(A) when projected cost savings funds are projected to be insufficient to remove clients with urgent need for health care benefits (or additional clients with urgent need for health care benefits) from the waiting list and maintain continuous program health care benefits coverage for those clients or when projected cost savings funds may lapse if not expended in this manner;

(B) as long as program cost savings funds are available; and

(C) if the outstanding bills for health care benefits are for dates of service that are within the time period that program cost savings funds are available and provided the client was eligible for program health care benefits at the time of the dates of service.

(d) When the program projects that the estimated amount of funds to be expended by the program in the fiscal year is less than the program's appropriated funds and other available resources due to the cost reduction, limitation, or deferral procedures implemented accord-

ing to subsections (b) or (c) of this section, or the program's receipt of additional funding, or funding analysis resulting in a projected amount of unobligated funds, the program shall increase the amount of funds to be expended by the program.

(1) In an effort to expend unobligated funds (except for unobligated funds resulting from program actions taken according to subsection (c) of this section), the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) take clients off the waiting list according to the original date and time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(i) clients who are less than 21 years old and who have an urgent need for health care benefits as described in subsection (e) of this section;

(ii) clients who are 21 years of age or older and who have an urgent need for health care benefits as described in subsection (e) of this section;

(iii) all other clients who are less than 21 years old who do not have an urgent need for health care benefits; and

(iv) all other clients who are 21 years of age or older who do not have an urgent need for health care benefits;

(B) provide health care benefits for clients taken off the waiting list as long as program unobligated funds are available;

(C) provide limited health care benefits for clients who are on the waiting list and remain on the waiting list, payment of outstanding bills for health care benefits for clients who are on the waiting list and remain on the waiting list, or payment of outstanding bills for health care benefits for clients who have been taken off the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the parameters set forth in subsection (b)(2)(C)(i) of this section. This coverage may be provided at any point during activities described by subparagraphs (A) and (B) of this paragraph only:

(i) when projected unobligated funds are projected to be insufficient to take clients (or additional clients) off the waiting list and maintain continuous program health care benefits coverage for those clients or when projected unobligated funds may lapse if not expended in this manner;

(ii) as long as program unobligated funds are available; and

(iii) if the outstanding bills for health care benefits are for dates of service that are within the time period that program unobligated funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;

(D) if the program projects that the amount of funds to be expended by the program in the fiscal year will be less than the program's appropriated funds and other available resources after no clients eligible for program health care benefits remain on the waiting list, the program may take the following actions in the following order:

(i) eliminate limitations on prior authorization for family support services;

(ii) provide prior authorized coverage of diagnosis and evaluation services for applicants who qualify for up to 60 days of program coverage for diagnosis and evaluation services only;

(iii) remove any of the additional measures taken to reduce or limit the amount of funds to be expended by the program as directed by rule;

(iv) remove any reductions or limitations to contractor reimbursements that have been implemented; and

(v) expand program services.

(2) In an effort to expend unobligated funds resulting from program actions taken according to subsection (c) of this section (unobligated cost savings funds that remain after all clients with urgent need for health care benefits have been removed from the waiting list and provided health care benefits), the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) take additional clients off the waiting list according to the original date and time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(i) clients who are less than 21 years old who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list;

(ii) clients who are 21 years of age or older who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list;

(B) provide health care benefits (which may or may not include coverage of outstanding bills for health care benefits) as stipulated in paragraph (1)(B) of this subsection for these clients taken off the waiting list;

(C) provide limited health care benefits for clients identified in subparagraph (A)(i) and (ii) of this paragraph who are on the waiting list and remain on the waiting list, payment of outstanding bills for health care benefits for clients identified in subparagraph (A)(i) and (ii) of this paragraph who are on the waiting list and remain on the waiting list, or payment of outstanding bills for health care benefits for clients who have been taken off the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the parameters set forth in subsection (b)(2)(C)(i) of this section. This coverage may be provided at any point during activities described by subparagraphs (A) and (B) of this paragraph and only as stipulated in paragraph (1)(C)(i) - (iii) of this subsection;

(D) remove any of the additional measures taken to generate cost savings by rule according to subsection (c)(1)(C) of this section; and

(E) remove any reductions or limitations to contractor reimbursements that have been implemented.

(e) The program shall establish a protocol to be used by the medical director or other designated medical staff to determine whether a client has an "urgent need for health care benefits" by considering criteria including, but not limited to, the following:

(1) the physician or dentist who signs the client's application or the treating physician or dentist attests or documents the physician's or dentist's determination that delay in receiving health care benefits could result in loss of life, permanent increase in disability, or intense pain and suffering;

(2) the client or family states that no other source of health insurance coverage is available to the client;

(3) information on the application for health care benefits indicates the complexity of the client's condition or need for care;

(4) information received from program regional case management staff or contractors supports other information gathered or indicates that a delay in health care benefits could reasonably be expected to result in an out-of-home placement or institutionalization of the client because the family cannot continue to care for the client; and

(5) information obtained from diagnosis and evaluation services as prior authorized by the program medical director or other designated medical staff.

(f) The program central office may establish and administer the waiting list for health care benefits to address a budget shortfall.

(1) In order to facilitate contacting clients on the waiting list, the program shall collect information including, but not limited to the following:

(A) the client's name, address, and telephone number;

(B) the name, address, and telephone number of a contact person other than the client;

(C) the date of the client's earliest application for health care benefits;

(D) the date on which the client became eligible for health care benefits;

(E) the client's functional limitations or needs;

(F) the range of services needed by the client; and

(G) a date on which the client is scheduled for reassessment.

(2) The waiting list is maintained continually from one fiscal year to the next. Clients must maintain eligibility for health care benefits to remain on the waiting list. A lapse of eligibility for health care benefits constitutes loss of position on the waiting list.

(3) The program shall refer clients on the waiting list to other possible sources of services and shall contact waiting list clients periodically to confirm their continuing need for program services.

(4) The program will offer case management services as needed or desired to all clients who are eligible for health care benefits including those on the waiting list for health care benefits.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

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Lisa Hernandez

General Counsel

Department of State Health Services

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Proposal publication date: May 7, 2010

For further information, please call: (512) 458-7111 x6972



25 TAC §38.13

STATUTORY AUTHORITY

The repeal is authorized by Government Code, §531.0055(e), and Health and Safety Code, §§35.003, 35.004, 35.005, 35.006, and §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez

General Counsel

Department of State Health Services

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 25. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION AND CERTIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§25.1, 25.2, 25.4, 25.9, 25.10, 25.14, 25.20, 25.22, 25.24, 25.30, 25.32, and 25.34; and the repeal of §25.36.

The amendments to §§25.1, 25.4, 25.10, 25.14, 25.20, 25.22, 25.24, and 25.34 and the repeal of §25.36 are adopted *without changes* as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3430) and, therefore, will not be republished. The commission adopts §§25.2, 25.9, 25.30, and 25.32 *with changes* to the proposed text.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking changes the applicable standards for accrediting environmental testing laboratories, establishes the date on which the change in accreditation standards becomes effective, revises fees and fee categories, establishes the date on which

the revised fees and fee categories become effective, clarifies that laboratories operated by the commission are exempt from fees, clarifies when certain miscellaneous fees are applied, removes language in the rules that is no longer needed, and revises language in the rules to make them clearer, more consistent, and bring them up-to-date.

Texas Water Code (TWC), §5.802 requires the agency's laboratory accreditation program to be consistent with accreditation standards approved by the National Environmental Laboratory Accreditation Program (NELAP). The NELAP is a voluntary organization of state, territorial, and federal environmental organizations whose primary purpose is to grant mutually acceptable accreditations to environmental testing laboratories. The NELAP currently consists of 14 agencies located in 13 states.

On October 4, 2009, the NELAP adopted new accreditation standards. These standards were developed by the National Environmental Laboratory Accreditation Conference (NELAC) Institute, a standards development organization accredited by the American National Standards Institute. The new standards are: The NELAC Institute, Requirements for the National Environmental Laboratory Accreditation Program, consisting of Volume 1, *Management and Technical Requirements for Laboratories Performing Environmental Analysis*, EL-V1-2009; Volume 2, *General Requirements for Accreditation Bodies Accrediting Environmental Laboratories*, EL-V2-2009; Volume 3, *General Requirements for Environmental Proficiency Test Providers*, EL-V3-2009; and Volume 4, *General Requirements for an Accreditor of Environmental Proficiency Test Providers*, EL-V4-2009.

The NELAP also adopted a schedule for implementing the new standards. The new standards become effective on July 1, 2011. The rulemaking maintains the current standards for accreditation until July 1, 2011. Thereafter, the standards for accreditation are the standards adopted by the NELAP. The rulemaking ensures continued compliance with TWC, §5.802.

This change also ensures continued compliance with drinking water primacy requirements. Title 40 Code of Federal Regulations §142.10 requires a state, as a condition of primacy delegation, to establish and maintain a program for the certification of laboratories conducting analytical measurements of drinking water contaminants. The United States Environmental Protection Agency's (EPA) Office of Water has determined NELAP accreditations, and, therefore, accreditations issued through the commission's laboratory accreditation program, meet this requirement (Memoranda to Regional Drinking Water Representatives and Regional Laboratory Certification Officers from Cynthia C. Dougherty, Director, United States Environmental Protection Agency Office of Ground Water and Drinking Water, October 20, 1997 and October 1, 2002).

TWC, §5.803(b) and §25.30(a) require the agency to establish a schedule of reasonable accreditation fees designed to cover the costs of the accreditation program. The current schedule of fees does not cover program costs. The commission adopts with changes increases to most fees, additions to fee categories that are needed, deletion of fees and fee categories that are not needed, and clarifications of the types of analyses covered by certain fee categories.

The commission also adopts with changes additions to the types of costs associated with inspecting an out-of-state laboratory applying for primary accreditation that may be assessed as an additional fee. Currently, the commission assesses an additional

fee equal to the reasonable travel costs associated with inspecting a laboratory located outside of Texas. Travel costs may only be a small portion of the costs associated while inspecting the laboratory. The rulemaking allows the commission to recoup all costs incurred inspecting laboratories located outside of Texas.

In adopting fee changes, the commission changed the effective date from the date proposed, January 1, 2011, to September 1, 2011. Until September 1, 2011, the current schedule of fees will apply. The commission estimates the new schedule of fees will generate approximately \$847,000 per year. This level of revenue combined with current levels of federal funds is sufficient to cover program costs.

Laboratories operated by the commission do not currently pay accreditation fees. The rulemaking clarifies that these laboratories are exempt from paying accreditation fees.

The rulemaking changes references to "accreditation authority" to "accreditation body." The phrase, "accreditation body" is used in international standards relating to laboratory accreditation, i.e., International Organization for Standardization (ISO)/International Electromechanical Commission (IEC), *Conformity assessment - General requirements for accreditation bodies accrediting conformity assessment bodies*, ISO/IEC 17011:2004(E), and the accreditation standards recently adopted by the NELAP. The change makes the rules consistent with these standards.

The rulemaking adds a definition for "Corrective action reports." Laboratory personnel prepare corrective action reports and submit them to the executive director to address deficiencies identified during environmental testing laboratory assessments.

The rulemaking redefines the NELAP. The current definition contains a reference to the NELAC. NELAC was a voluntary organization of state, territorial, and federal environmental officials and interest groups whose primary purpose was to establish mutually acceptable national standards for accrediting environmental testing laboratories. However, the NELAC no longer exists. Therefore, the current definition can be confusing. The revised definition describes the NELAP more accurately as a voluntary organization of accreditation bodies whose primary purpose is to grant mutually acceptable accreditations to environmental testing laboratories.

House Bill 2912 (2001), §18.03(d), provided that the change in law made by the addition of TWC, §5.134, relating to the acceptance of environmental testing laboratory results by the commission, applied only to environmental testing laboratory results submitted to the commission on or after the third anniversary of the date on which the commission published notice in the *Texas Register* that the commission's environmental laboratory testing program has met the standards of the NELAC. The notice was published on July 1, 2005 (30 TexReg 3904). The third anniversary was July 1, 2008. The rulemaking amends §25.4 to provide that accreditation requirements, exemptions, and other requirements contained in the rule apply to environmental testing laboratory results prepared and submitted to the commission on or after July 1, 2008. The rulemaking strikes language that is no longer needed concerning the date on which laboratories could begin applying for accreditation. The rulemaking also makes clear that the commission is not currently issuing environmental testing laboratory certifications according to Subchapter C.

The rulemaking removes the reference to the commission's Compliance Support Division as this division no longer exists.

The rulemaking makes clear that proficiency test samples must be reported to the executive director as well as successfully analyzed according to the standards for accreditation.

The rulemaking removes the language requiring the executive director to determine the status of an environmental testing laboratory that does not successfully analyze proficiency test samples according to the standards for accreditation. This rule does not directly affect environmental testing laboratories and is addressed by the commission's internal operating procedures. Therefore, the current language is unnecessary.

The rulemaking combines current rules concerning the denial of applications for accreditation and revocation of accreditations and standardize language that describes conditions that may lead either to denial of an application or revocation of an accreditation. The rulemaking repeals current rules concerning revocation of accreditations.

The rulemaking makes clear that a laboratory has at most two opportunities to submit an acceptable corrective action report. The current standards for accreditation contain this requirement. The standards for accreditation that will become effective on July 1, 2011, state that two opportunities is the norm, but do not limit the number of opportunities a laboratory has to submit an acceptable corrective action report. The rulemaking continues the current requirement of two opportunities to submit an acceptable corrective action report. The rulemaking also provides that the executive director may, upon request, allow up to 60 days to submit an initial corrective action report. A second corrective action report must be submitted within 30 days.

SECTION BY SECTION DISCUSSION

SUBCHAPTER A: GENERAL PROVISIONS

§25.1, *Purpose*

The rulemaking amends §25.1 by deleting language stating when the commission's laboratory accreditation program become effective.

§25.2, *Definitions*

The rulemaking amends §25.2(2) to refer to an "accreditation body" rather than to an "accreditation authority."

The rulemaking adds a definition of "Corrective action report" as §25.2(5) and renumber existing subsequent paragraphs as paragraphs (5) - (12).

The rulemaking amends current §25.2(6) by substituting the term "body" for "authority" and by substituting the phrase "standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Testing Laboratory Accreditation) or certification as specified in §25.50 of this title (relating to Standards for Environmental Testing Laboratory Certification)" for "National Environmental Laboratory Accreditation Conference (NELAC) accreditation or United States Environmental Protection Agency certification standards." The standards for accreditation and certification are specified in §25.9, concerning Standards for Environmental Testing Laboratory Accreditation and §25.50, concerning Standards for Environmental Testing Laboratory Certification, respectively. The more general reference in §25.2(6) is unnecessary and, since the NELAP has adopted new standards for accreditation, would be out of date as of July 1, 2011.

The rulemaking removes the language in current §25.2(13) as the NELAC no longer exists.

The rulemaking amends current §25.2(14) by redefining the NELAP. The current definition defines the NELAP as "The environmental testing laboratory accreditation program including NELAC." The NELAC no longer exists. The rulemaking defines the NELAP as "The voluntary organization of state, territorial, and federal environmental organizations whose primary purpose is to grant mutually acceptable accreditations to environmental testing laboratories."

The rulemaking amends current §25.2(17) by replacing a reference to, "NELAC standards" with "the standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Testing Laboratory Accreditation)."

The rulemaking amends §25.2(21) by adding National Environmental Laboratory Accreditation Program and replacing the phrase "accrediting authority" with the phrase "accreditation body."

§25.4, *Applicability*

The rulemaking amends §25.4(a) by removing the language in subsection (a) and relettering subsections (b) - (e). The rulemaking also revises internal references in current §25.4(d) to reflect the relettering of current §25.4(b) - (e). The rulemaking also amends current §25.4(d) by replacing language stating, "the third anniversary of the date on which the commission publishes notice in the Texas Register that the commission's environmental laboratory testing program established under this chapter has met NELAC standards with "July 1, 2008."

The rulemaking amends current §25.4(e) by removing the phrase "Until subsection (d) of this section is effective." Current §25.4(d) became effective on July 1, 2008. The introductory text in current §25.4(e) is no longer needed. The rulemaking also removes language in current §25.4(e)(2) referring to certification of drinking water laboratories according to Subchapter C and renumber existing paragraph (3) as paragraph (2). The commission is not currently certifying laboratories according to Subchapter C.

The rulemaking deletes current §25.4(f). The commission is not currently certifying laboratories according to Subchapter C. Changes to current §25.4(e) make the language in current §25.4(f) unnecessary.

SUBCHAPTER B: ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

§25.9, *Standards for Environmental Testing Laboratory Accreditation*

The rulemaking rennumbers current §25.9 as §25.9(a) and adds language stating the current standards for accreditation are in effect until July 1, 2011. The rulemaking adds §25.9(b), which adopts new standards for accreditation effective July 1, 2011. The new standards are those adopted by the NELAP.

§25.10, *Fields of Accreditation*

The rulemaking amends §25.10 to remove the reference to the Compliance Support Division, as this division no longer exists. A list of the commission's fields of accreditation is still be available from Agency Communications and on the commission's Web site.

§25.14, *Term of Accreditation*

The rulemaking amends §25.14(a) by replacing a reference to the "National Environmental Laboratory Accreditation Conference (NELAC) standards" with the phrase "applicable standards

for accreditation as specified in §25.9 of this title (relating to Standards for Environmental testing Laboratory Accreditation)." The standards for accreditation are specified in §25.9, concerning Standards for Environmental Testing Laboratory Accreditation, and, as of July 1, 2011, the reference to NELAC standards would be incorrect. For the same reasons, the rulemaking also amends §25.14(b) by deleting the term NELAC and referring to "the standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental testing Laboratory Accreditation)."

§25.20, Proficiency Test Sample Analyses

The rulemaking amends §25.20(a) by replacing reference to the "National Environmental Laboratory Accreditation Conference (NELAC) standards" with the phrase "standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Laboratory Accreditation)." The rulemaking amends §25.20(b) to make clear that the proficiency test samples must be successfully analyzed and reported to the executive director. The rulemaking also amends §25.20(b) to replace a reference to the "NELAC standards" with references to the "standards for accreditation." The rulemaking removes §25.20(c) and reletters current subsection (d) as subsection (c).

§25.22, Secondary Accreditation of Out-of-State Environmental Testing Laboratories

The rulemaking amends §25.22(a) to replace a reference to "accrediting authority" with "accreditation body."

§25.24, Duties and Responsibilities of Accredited Environmental Testing Laboratories

The rulemaking amends §25.24(2) to replace references to the "National Environmental Laboratory Accreditation Conference (NELAC) standards" with the phrase "standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental testing Laboratory Accreditation)." The rulemaking amends §25.24(3) by replacing a reference to "NELAC standards for accreditation" with "standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Testing Laboratory Accreditation)."

§25.30, Accreditation Fees

Section 25.30(c) is adopted with changes to the proposed text; the rulemaking amends §25.30(c) by raising the administrative fee for laboratories applying for secondary accreditation from \$250 to \$350 effective September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011.

Section 25.30(d) - (h) is adopted with changes to the proposed text; the rulemaking amends §25.30(d) - (h) to make the current fees applicable until September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The rulemaking also amends §25.30(e)(8), (f)(8), (g)(8), and (h)(7) to clarify that the fees apply to analyses of organic compounds by gas chromatography using detection other than mass spectrometry. The rulemaking also amends §25.30(e)(8) and (g)(8) to clarify that the fees apply to analyses of organic compounds by gas chromatography using detection other than mass spectrometry involving agency

method 1005 and/or any field of accreditation other than agency method 1005.

Section 25.30(i) is adopted with changes to the proposed text; §25.30(i) includes the annual category fees for analyses relating to drinking water that become effective on September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The current and new category fees are, respectively: microbiology - \$75 and \$255; radiochemistry - \$225 and \$510; metals - \$225 and \$385; general chemistry - \$225 and \$510; disinfection by-products - \$150 and \$255; volatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$255; semivolatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; organic compounds by gas chromatography using detection other than mass spectrometry - \$300 and \$510; organic compounds by high performance liquid chromatography - \$300 and \$510; polychlorinated dibenzo-p-dioxins and dibenzofurans - \$150 and \$385; and asbestos - \$150 and \$385.

Section 25.30(j) is adopted with changes to the proposed text; §25.30(j) includes the annual category fees for analyses relating to non-potable water that become effective on September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The current and new category fees are, respectively: microbiology - \$75 and \$255; aquatic toxicity - \$150 and \$510; radiochemistry - \$150 - \$510; metals - \$225 and \$385; general chemistry - \$225 and \$510; volatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$255; semivolatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; organic compounds by gas chromatography: (A) total petroleum hydrocarbons by agency method 1005 only - \$150 and \$255; and (B) agency method 1005 and/or any other fields of accreditation - \$300 and \$510; organic compounds by high performance liquid chromatography - \$300 and \$510; and polychlorinated dibenzo-p-dioxins and dibenzofurans - \$150 and \$385. Section 25.30(j) removes a category fee for asbestos analyses in non-potable water because the category is not needed. Section 25.30(j) includes a category fee for waste characteristics and set the fee for this category at \$255.

Section 25.30(k) is adopted with changes to the proposed text; §25.30(k) includes the annual category fees for analyses relating to biologic tissue that will become effective on September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The current and new category fees are, respectively: radiochemistry - \$150 and \$510; metals - \$225 and \$510; general chemistry - \$225 and \$510; volatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; semivolatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; organic compounds by gas chromatography - \$300 and \$510; organic compounds by high performance liquid chromatography - \$300 and \$510; and polychlorinated dibenzo-p-dioxins and dibenzofurans - \$150 and \$385.

Section 25.30(l) is adopted with changes to the proposed text; §25.30(l) includes the annual category fees for analyses relating to solid and chemical materials that will become effective on

September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The current and new category fees are, respectively: microbiology - \$75 and \$255; radiochemistry - \$150 and \$510; metals - \$225 and \$385; waste characteristics - \$150 and \$255; general chemistry - \$225 and \$510; volatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$255; semivolatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; organic compounds by gas chromatography: (A) total petroleum hydrocarbons by agency method 1005 only - \$150 and \$255; and (B) agency method 1005 and/or any other fields of accreditation - \$300 and \$510; organic compounds by high performance liquid chromatography - \$300 and \$510; and polychlorinated dibenzo-p-dioxins and dibenzofurans - \$150 and \$385. The rulemaking deletes an existing annual category fee for asbestos analyses in solid and chemical materials because the category is not needed. The rulemaking also adds a new category fee for aquatic toxicity and set the fee for this category at \$510.

Section 25.30(m) is adopted with changes to the proposed text; §25.30(m) includes the annual category fees for analyses relating to air and emissions that will become effective on September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011. The current and new category fees are, respectively: radiochemistry - \$150 and \$510; particulate matter - \$75 and \$255; metals - \$225 and \$385; general chemistry - \$150 and \$510; volatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$255; semivolatile organic compounds by gas chromatograph mass spectrometry - \$150 and \$385; organic compounds by gas chromatography - \$300 and \$510; organic compounds by high performance liquid chromatography - \$300 and \$510; and polychlorinated dibenzo-p-dioxins and dibenzofurans - \$150 and \$385. The rulemaking also deletes an existing annual category and fee for analyses of asbestos and airborne fibers because the category is not needed.

As a result of adding §25.30(i) - (m), the rulemaking reletters current §25.30(j) and (k).

Section 25.30(i) is adopted with changes to the proposed text; the rulemaking amends current §25.30(i) to include labor and other costs incurred inspecting out-of-state laboratories applying to the commission for primary accreditation effective September 1, 2011. The commission realizes some organizations may need more time to consider and plan for the increase in fees than was proposed. Therefore, the commission changed the rules to make the fee increases effective on September 1, 2011.

The rulemaking amends current §25.30(j) to clarify that miscellaneous fees are assessed as applicable in addition to any other fees. The rulemaking also amends §25.30(j)(1) to clarify that the miscellaneous fee for modifying a laboratory's scope of accreditation and add one or more fields of accreditation applies to modifications made during the term of the laboratory's accreditation.

§25.32, Denial of Accreditation Application

The rulemaking amends §25.32 by changing the section title to include revocation of accreditation.

The rulemaking amends §25.32(a) by clarifying that the executive director may deny an initial or renewal application for accreditation in whole or in part. The rulemaking also amends §25.32(a) by clarifying that the executive director may deny an initial or renewal application for accreditation if a laboratory's operator as well as its personnel fail to meet any of the stated requirements.

The rulemaking makes minor editorial changes to current §25.32(a)(1) - (8) by adding "fails to" to the beginning of each paragraph.

The rulemaking amends §25.32(a)(8) by including the phrase "corrective action" in reference to the report submitted by a laboratory's operator or personnel. The rulemaking also amends §25.32(a)(8) by adding §25.32(a)(8)(A) stating the executive director will provide a laboratory with two opportunities to provide an acceptable corrective action report and the initial report is due within 30 days of receiving an assessment report, unless the executive director grants a request to allow up to 60 days to submit the report. The rulemaking also amends §25.32(a)(8) by adding §25.32(a)(8)(B) stating that the executive director will notify a laboratory within no more than 60 days of any unresolved deficiencies if the laboratory submits a corrective action report that does not sufficiently address the deficiencies identified in an environmental testing laboratory assessment report. The rulemaking also amends §25.32(a)(8) by adding §25.32(a)(8)(C), which states that after being notified the first corrective action report did not sufficiently address one or more deficiencies identified in an assessment report; a second corrective report that sufficiently addresses the deficiencies must be submitted within 30 days.

The rulemaking amends §25.32 by adding §25.32(a)(10), misrepresentation of any fact pertinent to receiving or maintaining accreditation, §25.32(a)(11), indebtedness to the state for a fee, penalty, or tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute, and §25.32(a)(12), any other reason which causes the executive director to determine that quality of the data being produced by the laboratory's personnel is unreliable or inaccurate, based on the facts of the case, as reasons why the executive director may deny an initial or renewal application in whole or in part.

The rulemaking amends §25.32(b) by renaming the subsection from "Cause" to "Revocation of Accreditation." The rulemaking replaces the current text with language stating that, after notice and opportunity for hearing, the commission may revoke an environmental testing laboratory's accreditation, in whole or in part, if the laboratory's operator or personnel fail to correct deficiencies that led to a suspension of accreditation within six months of the notice of suspension, is convicted in any jurisdiction of charges relating to the falsification of any report relating to a laboratory analysis, or for the reasons specified in §25.32(a).

The rulemaking amends §25.32 by adding §25.32(c), which provides that the commission can deny a laboratory's application or revoke a laboratory's accreditation if the executive director determines that the data quality is unreliable or inaccurate.

The rulemaking amends §25.32 by adding §25.32(d), which requires the commission to revoke an environmental testing laboratory's accreditation if, after being suspended due to failure of proficiency test samples, a laboratory's analysis of the next proficiency sample results in three consecutive failures.

The rulemaking rennumbers current §25.32(c) as §25.32(e)(1), replaces reference to "National Environmental Laboratory Accreditation Conference standards" with the phrase "standards for accreditation as specified in §25.9 of this title (relating to Stan-

dards for Environmental Testing Laboratory Accreditation)," and clarifies that denial may be in whole or in part. The rulemaking also amends §25.32 by adding §25.32(e)(2) requiring an environmental testing laboratory whose accreditation is revoked in whole or in part to wait a minimum of one year before reapplying for accreditation and to meet all requirements for a new accreditation, including an environmental testing laboratory assessment.

§25.34, Suspension of Accreditation

The rulemaking amends §25.34(a) to state that reasons to suspend accreditation are not limited to the reasons listed in subsection (a).

The rulemaking amends §25.34(b)(3) to replace reference to the "National Environmental Laboratory Accreditation Conference standards" with the phrase "the standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Testing Laboratory Accreditation)."

§25.36, Revocation of Accreditation

The rulemaking repeals §25.36 as this language is no longer necessary.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking updates the applicable standards for accrediting environmental testing laboratories, establishes the date on which the updated accreditation standards become effective, revises fees and fee categories, establishes the date on which the revised fees and fee categories become effective, clarifies that laboratories operated by the commission are exempt from fees, clarifies when certain miscellaneous fees are applied, removes language in the rules that is no longer needed, and revises language in the rules to make them clearer, more consistent, and bring them up-to-date. These rules are not a major environmental rule and do not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, §2001.0225, these rules do not exceed a standard set by federal law or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The rules do not exceed a standard set by federal law or exceed the requirement of a delegation agreement because there is no federal authority regarding laboratory accreditation.

These revisions do not adopt a rule solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements that are implemented through these rules are expressly defined under TWC, Chapter 5, Subchapter R, which requires the commission to enact rules governing the accreditation of environmental laboratories.

TAKINGS IMPACT ASSESSMENT

The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this rulemaking because the rules are not a taking as defined in Chapter 2007, nor are they a constitutional taking of private real property. The purpose of the repeal and amendments is to update the rules to current NELAP standards and revise fees paid by environmental testing laboratories for laboratory assessments.

Promulgation and enforcement of these rules will not affect private real property, which is the subject of the rules, because the amendments will not restrict or limit the owner's right to the property or cause a reduction of 25% or more in the market value of the property. The rules only apply to environmental testing laboratories that submit data to the commission for use in its decisions. Property values will not be decreased, because the amendments will not limit the use of real property. Thus, these rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. The commission received no comments concerning the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on May 24, 2010. The comment period closed on June 1, 2010. The commission received comments from the Angelina and Neches River Authority (ANRA) and the Brazos River Authority (BRA).

ANRA supported the rules but also offered comments for the record. The comments included suggested changes to the rules as proposed.

The BRA supported the change in accreditation standards. The BRA does not support the fee increases as proposed.

RESPONSE TO COMMENTS

Comment

ANRA supported adoption of the new standards for accreditation but noted that the new standards incorporate copyrighted material from ISO/IEC 17025 and 17011. According to ANRA, the publicly available (no cost) copy of the new standards contains references to the copyrighted material but not the copyrighted text itself. A copy of the new standards, containing the copyrighted material, is available for purchase. Purchasing the new standards adds another cost associated with operating as an accredited laboratory in addition to the proposed fee increases.

The commission is aware, and appreciates ANRA noting that there is a cost associated with acquiring a copy of the new standards for accreditation containing the copyrighted material. In its calculation of fiscal impacts, the commission assumed accredited laboratories have already acquired copies of the new accreditation standards or would do so before the change in accreditation standards becomes effective. For laboratories that have not or do not, the commission acknowledges those laboratories will incur a cost if they choose to acquire copies of the new standards containing the copyrighted material.

The commission notes that the NELAC Institute has taken steps to minimize the cost of obtaining a copy of the new standards. The public purchase price for a single-user copy of the new standards containing the copyrighted material is less than one-half of

the normal retail cost for the copyrighted material alone. For Institute members, the cost is less than one-quarter of the cost. Organizational members of the NELAC Institute receive a copy of the new standards containing the copyrighted material at no cost.

The commission made no changes to the rules in response to this comment.

Comment

The BRA supported the adoption of the new standards for accreditation.

The commission appreciates BRA's support for the adoption of the new standards for accreditation. The commission made no changes to the rules as a result of this comment.

Comment

ANRA supported an increase in the program's fee structure. Rather than increasing fees on a variable approach as proposed, ANRA suggested a percentage-based increase that is consistent across all categories.

The commission appreciates ANRA's support for an increase in the laboratory accreditation program's fee structure.

Current and proposed fees take a number of factors into account, including program costs, the relative complexity of each category of analysis, and the relative level of resources needed to inspect laboratories performing each category of analysis. The current fees reflect estimates of these factors made in 2001 and 2002. The fees proposed by the commission reflect experience gained over the past five years of program operations. In certain cases, the commission determined the estimates of relative complexity and resource requirements made in 2001 and 2002 should be changed. These changes account for the different percentage increases reflected in the proposed fees.

The commission acknowledges increasing fees for all analytical categories by the same percentage would be a simpler approach. It would not, however, take into account differences in the relative complexity and resource requirements associated with each category of analysis and experience gained over the last five years of program operation. The commission believes the latter approach is a more equitable way of determining fees.

The commission made no changes to the rules as a result of this comment.

Comment

ANRA stated that the proposed fee increases for microbiological and general chemical testing were probably structured the way they were proposed because almost all laboratories would be accredited for these tests and these fees will form the bulk of the program's revenues.

The commission respectfully disagrees with the comment. Current and proposed fees take a number of factors into account, including program costs, the relative complexity of each category of analysis, and the relative level of resources needed to assess each category of analysis.

The commission made no changes to the rules as a result of this comment.

Comment

ANRA stated the overall percentage increase in fees will be higher for smaller, non-commercial laboratories (such as those

associated with municipal wastewater treatment plants, water utilities, health districts, and some river authorities) that are only accredited either for microbiological or general chemistry tests, and they will, therefore, be disproportionately affected.

The commission respectfully disagrees with the comment. As of December 4, 2009, the commission had awarded accreditations to 69 laboratories operated by local governments, including river authorities. Excluding larger laboratories operated by these local governments (those whose proposed fees would be \$2,000 per year or more), the average fee increase would be \$309 per year, or approximately 46%. The median fee increase would be \$180 per year, or approximately 31%. The average and median fee increases for the 192 commercial laboratories accredited by the commission would be \$1,694, or approximately 88%, and \$1,350, or approximately 87%, respectively.

The commission made no changes to the rules as a result of this comment.

Comment

ANRA stated that TCEQ should improve efficiency and reduce program costs in addition to increasing fees. ANRA suggested that TCEQ could reduce the frequency of on-site inspections, reduce the number of assessors conducting each on-site inspection, and reduce the length of on-site inspections. According to ANRA, much of what laboratory inspectors currently do in the field could be done as a desk review and, by reviewing a larger portion of documents at TCEQ's offices, on-site inspections could be reduced by one or more days.

The commission believes its laboratory accreditation program is both efficient and cost-effective. Nonetheless, the commission has and will continue to seek ways to improve efficiency and reduce program costs.

The commission respectfully disagrees it could reduce the frequency of on-site inspections. The standards for accreditation and commission rules require, at a minimum, one on-site inspection before granting initial accreditation and biennial inspections thereafter.

The commission's current inspection process already includes considerable desk review in advance of an on-site inspection. The primary purpose of the on-site inspection is to assess actual laboratory operations and determine their conformance to the standards for accreditation and the laboratory's written policies and procedures.

The commission already attempts to minimize the number of assessors involved in on-site inspections and the length of the inspections. For example, only one individual was assigned to conduct the last on-site inspection of ANRA's laboratory. The inspection began the afternoon of June 8, 2009, and concluded at approximately midday on June 11, 2009. During the inspection, the inspector reviewed operations and records relating to over two dozen analytical methods in three matrices. The commission believes the allocation of time and personnel for this inspection were appropriate. Nonetheless, the commission will continue its efforts to make the laboratory inspection program even more efficient.

The commission made no changes to the rules as a result of this comment.

Comment

ANRA stated fee increases should not have a significant fiscal impact on its operations but will result in higher charges to the

authority's customers, including TCEQ's Clean Rivers Program. According to ANRA, funds allocated to Clean Rivers partners have not increased since 1991 and, without an increase in Clean Rivers funding, the most likely scenario would be reduced monitoring.

The commission acknowledges the fee increase will result in higher charges to the authority's customers if the authority opts to pass the fee increase to its customers. The commission notes, however, that, while the proposed increase in ANRA's annual accreditation fee is a large percentage increase, the dollar amount of the increase is \$930 per year, or approximately one-half of 1% of the authority's annual Clean Rivers program allocation. Assuming the fee increase will be spread among all of the authority's customers, the commission believes it should not have a significant impact on water quality monitoring.

The commission made no changes to the rules as a result of this comment.

Comment

ANRA commented that the commission's actions on the proposed rules could unintentionally reduce the amount of water quality data available for assessments, though ANRA believes the likely impact from the rulemaking will be minimal.

The commission concurs that the likely impact of the fee increases will be minimal. The commission made no changes to the rules as a result of this comment.

Comment

BRA commented that the organization understands the need for increased revenue to fund the accreditation program and stated it did not oppose a fee increase. However, it believes an overall 84.6% in a one-year time period is excessive and unreasonable.

The commission proposed fee increases in April of 2010 in order to give affected parties time to incorporate any increases into their budgeting and planning cycles. The commission also proposed delaying the implementation date of the increases until January 2011 for the same reason.

The commission is obligated to establish a schedule of fees that cover program costs. The commission realizes some organizations may need more time to consider and plan for the increase in fees, however. Therefore, the commission has elected to implement the fee increases on September 1, 2011.

Comment

BRA commented that it operates two accredited laboratories. The primary customers for one of the laboratories are TCEQ's Clean Rivers, Non-Point Source, and Surface Water Quality Programs. BRA stated the proposed fees would increase the annual fees of the two laboratories by 79% and 82%. These increases will result in reduced water quality monitoring and increased expenses for the organization's municipal customers.

The commission acknowledges the fee increase may result in higher charges to all of the authority's customers. The commission notes, however, that, while the proposed increase in BRA's annual accreditation fees are a large percentage increase, the dollar amount of the increase (\$1,110 total) is less than one-half of 1% of the authority's annual Clean Rivers program allocation. Assuming the fee increase will be spread among all of the authority's customers, the commission believes it should not have a significant impact on water quality monitoring or the authority's other customers.

The commission made no changes to the rules as a result of this comment.

Comment

BRA suggested TCEQ increase fees incrementally over three to five years. BRA stated a phased approach would make the initial impact of fee increases less severe and give BRA and its customers time to anticipate and budget for the increases. A phased approach would also allow BRA to inform customers of the increases prior to presentation of annual budgets, which occurs in May of each year.

The commission proposed the new fees in April of 2010. However, the proposed effective date of the increases would be January 2011. The commission delayed the effective date to give laboratories time to incorporate any increases into their budgeting and planning cycles. Phasing in fee increases would reduce the initial fee increases, but revenues would not begin to cover program costs for three to five years.

The commission is obligated to establish a schedule of fees that cover program costs, however, the commission realizes some organizations may need more time to consider and plan for the increase in fees. Therefore, in response to comment, the commission changed the rules to make the fee increases effective on September 1, 2011.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§25.1, 25.2, 25.4

STATUTORY AUTHORITY

The amendments are adopted under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807, which require the agency to adopt rules and establish fees for the administration of the laboratory accreditation program.

These amendments implement the TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807.

§25.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Accreditation--An authorization granted by the executive director to an environmental testing laboratory that meets requirements of this subchapter and Subchapter B of this chapter (relating to Environmental Testing Laboratory Accreditation).

(2) Accreditation body--An agency recognized by the National Environmental Laboratory Accreditation Program (NELAP) that grants accreditation on behalf of a state, territory, or federal agency.

(3) Analyte--A constituent for which an environmental sample is analyzed.

(4) Certification--An authorization granted by the executive director to an environmental testing laboratory that analyzes drinking water and which meets requirements of this subchapter and Subchapter C of this chapter (relating to Environmental Testing Laboratory Certification).

(5) Corrective action report--A report prepared by an environmental testing laboratory and submitted to the executive director

that describes the specific actions taken or planned to address negative findings (deficiencies) contained in an environmental testing laboratory assessment report, actions taken or planned to prevent recurrence, the timetable for completing each action, and the means to be used to document completion of each action.

(6) Environmental testing laboratory--A scientific laboratory that performs analyses to determine the chemical, molecular, or pathogenic components of environmental media for regulatory compliance.

(7) Environmental testing laboratory assessment--The process used by an accrediting or certifying body to measure the performance, effectiveness, and conformity of an environmental testing laboratory to the standards for accreditation as specified in §25.9 of this title (relating to Standards for Environmental Testing Laboratory Accreditation) or certification as specified in §25.50 of this title (relating to Standards for Environmental Testing Laboratory Certification) and the requirements of this chapter. An environmental testing laboratory assessment may include a physical inspection of a laboratory and its operations.

(8) Fields of accreditation--The matrix, technology, method, and analyte or analyte group for which an environmental testing laboratory may be accredited.

(9) Fields of certification--The methods and analytes for which an environmental testing laboratory may be certified. The methods and analytes are used in a commission decision relating to compliance with the Safe Drinking Water Act.

(10) In-house environmental testing laboratory--An environmental testing laboratory that provides analytical data to its operator for a commission decision relating to:

(A) permits or other authorizations issued to the laboratory's operator;

(B) compliance matters and enforcement actions taken concerning the laboratory's operator; or

(C) corrective actions taken by the laboratory's operator to satisfy statutes, rules, or commission orders.

(11) Laboratory personnel--Individuals who manage, perform, maintain, or verify the work or the quality of the work at the environmental testing laboratory.

(12) Matrix--Sample type, including drinking water; non-potable water; solid and chemical materials; air and emissions; and biological tissue.

(13) Mobile environmental testing laboratory--An environmental testing laboratory capable of being moved from one site to another site.

(14) National Environmental Laboratory Accreditation Program (NELAP)--The voluntary organization of state, territorial, and federal accreditation bodies whose primary purpose is to grant mutually acceptable accreditations to environmental testing laboratories.

(15) On-site environmental testing laboratory--An in-house environmental testing laboratory located at a regulated entity.

(16) Operator--An individual authorized to act on behalf of the environmental testing laboratory.

(17) Primary accreditation--Accreditation of an environmental testing laboratory according to the standards for accreditation as specified in §25.9 of this title and the requirements of this chapter.

(18) Proficiency test sample--A sample, the composition of which is unknown by an environmental testing laboratory or the individual performing the analysis. The sample is used to evaluate whether the laboratory and analyst can produce results within the specified acceptance criteria.

(19) Quality system--A structured and documented management system describing the policies, objectives, principles, organizational authority, responsibilities, accountability, and implementation plan of an organization for ensuring the quality of its work processes, products, and services. The quality system provides the framework for planning, implementing, and assessing work performed by the environmental testing laboratory for quality assurance and quality control.

(20) Same site--All structures, other appurtenances, and improvements located on one or more contiguous properties.

(21) Secondary accreditation--Accreditation granted by the executive director to an environmental testing laboratory that has been granted primary accreditation by another National Environmental Laboratory Accreditation Program accreditation body.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-0177



SUBCHAPTER B. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

30 TAC §§25.9, 25.10, 25.14, 25.20, 25.22, 25.24, 25.30, 25.32, 25.34

STATUTORY AUTHORITY

The amendments are adopted under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807, which require the agency to adopt rules and establish fees for the administration of the laboratory accreditation program.

These amendments implement the TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807.

§25.9. *Standards for Environmental Testing Laboratory Accreditation.*

(a) Until July 1, 2011, accreditation, must be based on an environmental testing laboratory's conformance to National Environmental Laboratory Accreditation Conference standards approved June 2003 and the requirements of this chapter.

(b) After June 30, 2011, accreditation must be based on an environmental testing laboratory's conformance to the most current standards adopted by the National Environmental Laboratory Accreditation Program and the requirements of this chapter.

§25.30. Accreditation Fees.

(a) The executive director shall establish accreditation fees that cover program costs, including costs associated with application review; initial, routine, and follow-up inspections; and preparation of reports.

(b) The operator of an environmental testing laboratory seeking primary accreditation shall pay the following fees:

(1) an annual administrative fee of \$500; and

(2) an annual accreditation fee based on the categories for which the laboratory is accredited.

(c) Excluding any laboratory operated by the commission, the operator of an environmental testing laboratory seeking secondary accreditation shall pay the following fees:

(1) until September 1, 2011, an annual administrative fee of \$250;

(2) after August 31, 2011, an annual administrative fee of \$350; and

(3) an annual accreditation fee based on the categories for which the laboratory is accredited.

(d) Until September 1, 2011, the categories and annual fees for accreditation relating to drinking water are:

(1) microbiology--\$75;

(2) radiochemistry--\$225;

(3) metals--\$225;

(4) general chemistry--\$225;

(5) disinfection by-products--\$150;

(6) volatile organic compounds by gas chromatograph mass spectrometry--\$150;

(7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$150;

(8) organic compounds by gas chromatography using detection other than mass spectrometry--\$300;

(9) organic compounds by high performance liquid chromatography--\$300;

(10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$150; and

(11) asbestos--\$150.

(e) Until September 1, 2011, the categories and annual fees for accreditation relating to non-potable water are:

(1) microbiology--\$75;

(2) aquatic toxicity--\$150;

(3) radiochemistry--\$150;

(4) metals--\$225;

(5) general chemistry--\$225;

(6) volatile organic compounds by gas chromatograph mass spectrometry--\$150;

(7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$150;

(8) organic compounds by gas chromatography using detection other than mass spectrometry:

(A) total petroleum hydrocarbons by agency methods 1005 only--\$150; and

(B) agency method 1005 and/or any fields of accreditation other than agency method 1005--\$300;

(9) organic compounds by high performance liquid chromatography--\$300;

(10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$150; and

(11) asbestos--\$150.

(f) Until September 1, 2011, the categories and annual fees for accreditation relating to biologic tissue are:

(1) radiochemistry--\$150;

(2) metals--\$225;

(3) general chemistry--\$225;

(4) volatile organic compounds by gas chromatograph mass spectrometry--\$150;

(5) semivolatile organic compounds by gas chromatograph mass spectrometry--\$150;

(6) organic compounds by gas chromatography using detection other than mass spectrometry--\$300;

(7) organic compounds by high performance liquid chromatography--\$300; and

(8) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$150.

(g) Until September 1, 2011, the categories and annual fees for accreditation relating to solid and chemical materials are:

(1) microbiology--\$75;

(2) radiochemistry--\$150;

(3) metals--\$225;

(4) waste characteristics--\$150;

(5) general chemistry--\$225;

(6) volatile organic compounds by gas chromatograph mass spectrometry--\$150;

(7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$150;

(8) organic compounds by gas chromatography using detection other than mass spectrometry:

(A) total petroleum hydrocarbons by agency method 1005 only--\$150; and

(B) agency method 1005 and/or any fields of accreditation other than agency method 1005--\$300;

(9) organic compounds by high performance liquid chromatography--\$300;

(10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$150; and

(11) asbestos--\$150.

(h) Until September 1, 2011, the categories and annual fees for accreditation relating to air and emissions are:

- (1) radiochemistry--\$150;
- (2) particulate matter--\$75;
- (3) metals--\$225;
- (4) general chemistry--\$150;
- (5) volatile organic compounds by gas chromatograph mass spectrometry--\$150;
- (6) semivolatile organic compounds by gas chromatograph mass spectrometry--\$150;
- (7) organic compounds by gas chromatography using detection other than mass spectrometry--\$300;
- (8) organic compounds by high performance liquid chromatography--\$300;
- (9) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$150; and
- (10) asbestos and airborne fibers by microscopy--\$150.

(i) After August 31, 2011, the categories and annual fees for accreditation relating to drinking water are:

- (1) microbiology--\$255;
- (2) radiochemistry--\$510;
- (3) metals--\$385;
- (4) general chemistry--\$510;
- (5) disinfection by-products--\$255;
- (6) volatile organic compounds by gas chromatograph mass spectrometry--\$255;
- (7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (8) organic compounds by gas chromatography using detection other than mass spectrometry--\$510;
- (9) organic compounds by high performance liquid chromatography--\$510;
- (10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$385; and
- (11) asbestos--\$385.

(j) After August 31, 2011, the categories and annual fees for accreditation relating to non-potable water are:

- (1) microbiology--\$255;
- (2) aquatic toxicity--\$510;
- (3) radiochemistry--\$510;
- (4) metals--\$385;
- (5) general chemistry--\$510;
- (6) volatile organic compounds by gas chromatograph mass spectrometry--\$255;
- (7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (8) organic compounds by gas chromatography using detection other than mass spectrometry:

(A) total petroleum hydrocarbons by agency methods 1005 only--\$255; and

(B) agency method 1005 and/or any fields of accreditation other than agency method 1005--\$510;

(9) organic compounds by high performance liquid chromatography--\$510;

(10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$385; and

(11) waste characteristics--\$255.

(k) After August 31, 2011, the categories and annual fees for accreditation relating to biologic tissue are:

- (1) radiochemistry--\$510;
- (2) metals--\$510;
- (3) general chemistry--\$510;
- (4) volatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (5) semivolatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (6) organic compounds by gas chromatography using detection other than mass spectrometry--\$510;
- (7) organic compounds by high performance liquid chromatography--\$510; and
- (8) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$385.

(l) After August 31, 2011, the categories and annual fees for accreditation relating to solid and chemical materials are:

- (1) microbiology--\$255;
- (2) radiochemistry--\$510;
- (3) metals--\$385;
- (4) waste characteristics--\$255;
- (5) general chemistry--\$510;
- (6) volatile organic compounds by gas chromatograph mass spectrometry--\$255;
- (7) semivolatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (8) organic compounds by gas chromatography using detection other than mass spectrometry:

(A) total petroleum hydrocarbons by agency method 1005 only--\$255; and

(B) agency method 1005 and/or any fields of accreditation other than agency method 1005--\$510;

(9) organic compounds by high performance liquid chromatography--\$510;

(10) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$385; and

(11) aquatic toxicity--\$510.

(m) After August 31, 2011, the categories and annual fees for accreditation relating to air and emissions are:

- (1) radiochemistry--\$510;

- (2) particulate matter--\$255;
- (3) metals--\$385;
- (4) general chemistry--\$510;
- (5) volatile organic compounds by gas chromatograph mass spectrometry--\$255;
- (6) semivolatile organic compounds by gas chromatograph mass spectrometry--\$385;
- (7) organic compounds by gas chromatography using detection other than mass spectrometry--\$510;
- (8) organic compounds by high performance liquid chromatography--\$510; and
- (9) polychlorinated dibenzo-p-dioxins and dibenzofurans--\$385.

(n) Until September 1, 2011, the operator of an environmental testing laboratory located in another state and applying for primary accreditation shall also pay a fee equal to the reasonable travel costs (including transportation, lodging, per diem, and any telephone charges) associated with conducting an assessment at the laboratory.

(o) After August 31, 2011, the operator of an environmental testing laboratory located in another state and applying for primary accreditation shall also pay a fee equal to the labor, reasonable travel costs (including, but not limited to, transportation, lodging, per diem, and any telephone charges), and other reasonable costs associated with conducting an assessment at the laboratory.

(p) The following fees shall be assessed, as applicable, in addition to any other fees:

- (1) to modify an existing accreditation and add one or more fields of accreditation during the term of the accreditation--\$250;
- (2) to replace an accreditation certificate--\$50; and
- (3) to reinstate a suspended accreditation--\$250.

(q) All fees are nonrefundable.

§25.32. Denial of Accreditation Application and Revocation of Accreditation.

(a) Denial of Accreditation Application. The executive director may deny an initial or renewal application for environmental testing laboratory accreditation, in whole or in part, for insufficiency or for cause. The executive director shall notify the laboratory of the intent to deny the application and advise the applicant of the opportunity to file a motion to overturn under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision). The executive director may deny an accreditation application if a laboratory's operator or personnel:

- (1) fails to submit a completed application;
- (2) fails to submit the required fees;
- (3) fails to successfully analyze and report required proficiency test samples for applicable fields of accreditation;
- (4) fails to implement a quality system;
- (5) fails to document that laboratory personnel meet personnel qualifications of education, training, and experience;
- (6) fails to allow the executive director entry during normal business hours for an environmental testing laboratory assessment;
- (7) fails to pass required environmental testing laboratory assessments;

(8) fails to submit a corrective action report acceptable to the executive director identifying actions the environmental testing laboratory will take to correct the deficiencies identified in the environmental testing laboratory assessment report;

(A) the executive director will provide the environmental testing laboratory with two opportunities to resolve its deficiencies. The first corrective action report must be submitted to the executive director by the environmental testing laboratory within 30 days of receiving an assessment report. Upon request, the executive director may allow up to 60 days from the date the environmental testing laboratory received an assessment report to submit the corrective action report;

(B) if the first corrective action report does not sufficiently address the deficiencies identified in the environmental testing laboratory assessment report, the executive director shall notify the environmental testing laboratory of the unresolved deficiencies within no more than 60 days; and

(C) if, after being notified by the executive director that the first corrective action report does not sufficiently address one or more of the deficiencies identified in the environmental testing laboratory assessment report, a second corrective action report that sufficiently addresses the deficiencies identified in the environmental testing laboratory assessment report must be submitted within 30 days of being notified by the executive director;

(9) fails to implement actions to correct the deficiencies identified in the environmental testing laboratory assessment report within the time approved by the executive director;

(10) misrepresents any fact pertinent to receiving or maintaining accreditation;

(11) is indebted to the state for a fee, penalty, or tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute; or

(12) any other reason which causes the executive director to determine that quality of the data being produced by the laboratory's personnel is unreliable or inaccurate, based on the facts of the case.

(b) Revocation of Accreditation. After notice and opportunity for hearing according to Chapter 80 of this title (relating to Contested Case Hearings), the commission may revoke an environmental testing laboratory's accreditation, in whole or in part, for any of the reasons listed in subsection (a) of this section or if the operator laboratory:

(1) fails to correct deficiencies that led to a suspension of accreditation within six months of the notice of suspension; or

(2) is convicted in any jurisdiction of charges relating to the falsification of any report relating to a laboratory analysis.

(c) A laboratory's application for accreditation may be denied or a laboratory's accreditation may be revoked, after notice and opportunity for hearing, for any other reason if the executive director determines that the quality of the data being produced by the laboratory's personnel is unreliable or inaccurate, based on the facts of the case.

(d) The commission shall revoke an environmental testing laboratory's accreditation for each applicable field of accreditation if, after being suspended due to failure of proficiency test samples, an environmental testing laboratory's analysis of the next proficiency test sample results in three consecutively failed proficiency test samples.

(e) Waiting period.

(1) If the operator of an environmental testing laboratory is not successful in correcting deficiencies as required by the standards for accreditation as specified in §25.9 of this title (relating to Standards

for Environmental Testing Laboratory Accreditation) and this chapter and the laboratory's application is denied in whole or in part, the laboratory's operator must wait a minimum of six months before reapplying for accreditation.

(2) An environmental testing laboratory whose accreditation is revoked, in whole or in part, shall wait a minimum of one year before reapplying for accreditation, and the laboratory shall meet all requirements for a new accreditation, including an environmental testing laboratory assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0177



30 TAC §25.36

STATUTORY AUTHORITY

The repeal is adopted under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807, which require the agency to adopt rules and establish fees for the administration of the laboratory accreditation program.

The repeal implement the TWC, §§5.801, 5.802, 5.803, 5.805, 5.806, and 5.807.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 106. PERMITS BY RULE

SUBCHAPTER L. FEED, FIBER, AND FERTILIZER

The Texas Commission on Environmental Quality (commission or TCEQ) adopts an amendment to §106.283 and the repeal of §106.302.

The amendment to §106.283 and the repeal of §106.302 are adopted *without changes* as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2503) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The TCEQ has issued seven air quality standard permits (35 TexReg 3092, April 16, 2010) which provide a new method of authorization for a variety of agricultural operations. These agricultural standard permits update and streamline the authorizations used for non-major agricultural facilities, and as part of this effort, the TCEQ also reviewed permits by rule (PBRs) in Chapter 106, Permits by Rule, which have typically been claimed by the types of agricultural facilities that could be authorized by the standard permits. The TCEQ identified two PBRs (§106.283, Grain Handling, Storage, and Drying, and §106.302, Portable Pipe Reactor) that needed to be revised and repealed, respectively, to maximize the effectiveness of the standard permits, maintain protectiveness, and eliminate redundancy.

SECTION BY SECTION DISCUSSION

§106.283, Grain Handling, Storage, and Drying

The commission adopts an amendment to §106.283, which deletes existing §106.283(2), concerning grain facilities in commercial use. The TCEQ is adopting this change because a review of agency records indicates that this section for commercial facilities is rarely used and the standard permit for grain handling facilities contains requirements that are more appropriate for these sources. The standard permit is more flexible than §106.283(2) in terms of facility size and distance limitations and the standard permit does not require written approval and registration as does existing §106.283(2). The effect of the change to §106.283 is that new grain handling, storage, or drying facilities in commercial use cannot claim §106.283 as authorization and are required to be authorized in some other manner (such as a standard permit, case-by-case new source review permit, or some other applicable PBR). Commercial facilities would still be eligible to use §106.283(2) to add grain storage capacity, as is currently allowed. Existing commercial sources which are already registered under §106.283 remain authorized under the PBR unless there is a modification of the facility, in which case the owner or operator would be required to obtain another applicable authorization mechanism (such as the standard permit for grain handling facilities, or a case-by-case permit).

§106.302, Portable Pipe Reactor

The commission adopts the repeal of §106.302. The standard permit for polyphosphate blending operations (also known as pipe reactors) contains more appropriate, up-to-date requirements for these types of facilities. The standard permit also allows a wider range of operating configurations and a more flexible operating schedule compared to the PBR, while maintaining protectiveness. Repealing this section effectively eliminates new pipe reactors (polyphosphate blenders) from claiming this PBR as an authorization, and new pipe reactors are required to be authorized in some other manner (such as a standard permit, case-by-case new source review permit, or some other applicable PBR). Existing portable pipe reactors al-

ready registered under §106.302 can continue to operate at the authorized site under the PBR until the operating time allowed under the PBR has been exhausted (72 operating hours/four months). However, if a portable pipe reactor registered under §106.302 leaves the site at which it is authorized, the PBR authorization at that site immediately expires.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules more effectively focus commission resources by eliminating duplication and providing a clear regulatory structure. While aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure, the rules generally improve regulatory flexibility to regulated facilities and are therefore unlikely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. Because this rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, the rulemaking does not fit the Texas Government Code, §2001.0225 definition of "major environmental rule."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted rules do not constitute a major environmental rule, a regulatory impact analysis is not required.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The commission has determined that the promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. The amendment is admin-

istrative and does not impose any new regulatory requirements. The amendment to §106.283 and the repeal of §106.302 are intended to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. This change does not impact existing authorization under these sections. The rules are reasonably taken to fulfill requirements of state law. Therefore, the amendment to §106.283 and the repeal of §106.302 will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted rulemaking will indirectly benefit the environment because the amendment to §106.283 and the repeal of §106.302 is expected to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this rulemaking are minor sources and not subject to the Federal Operating Permits Program. In addition, these rule changes do not directly affect existing authorized sources unless those sources are modified and require new authorization. Therefore, there should be no direct effect on most sites subject to the federal operating permits program. However, if a facility is authorized by §106.283(2) or §106.302 and is located at a site with a federal operating permit, the permit holder may need to conduct an evaluation and determine if a revision to a federal operating permit is needed to update the applicable requirements.

PUBLIC COMMENT

The commission held a public hearing on the proposed changes in Austin on April 19, 2010, at 10:00 am, in Building E, Room 201S, at the commission's central office located at 12100 Park

35 Circle. The comment period closed on April 26, 2010. The commission received no comments on the rulemaking.

DIVISION 1. FEED

30 TAC §106.283

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, concerning Exemption, which authorizes exemptions from permitting.

The adopted amendment implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6090



DIVISION 3. FERTILIZER

30 TAC §106.302

STATUTORY AUTHORITY

The repeal of this section is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the

policy and purposes of the Texas Clean Air Act. The repeal is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, concerning Exemption, which authorizes exemptions from permitting.

The adopted repeal implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.17 and the amendments to §§116.10, 116.111, 116.116, 116.117 *with changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission withdraws the proposed amendment to §116.118 as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978).

The new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP) with the exception of §§116.10(5)(F), 116.111(a)(2)(K), 116.116(b)(3), and 116.117(a)(4)(B).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On April 14, 2010, the EPA published notice in the *Federal Register* (75 *Federal Register* 19468) of its disapproval of the TCEQ rules that implement the state's qualified facilities program, established by the Texas Legislature in 1995, as a SIP revision. The EPA based this disapproval on the following: 1) the program is not clearly limited to use in minor New Source Review

(NSR) and does not clearly prevent circumvention of major NSR requirements; 2) the program does not require that an applicability determination for major NSR be made first for facility changes; 3) the program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions; 4) the program is not an enforceable minor NSR program; and 5) the program lacks safeguards to prevent interference with national ambient air quality standard (NAAQS) attainment and maintenance. The rules in this action address these issues.

In its September 23, 2009, (74 *Federal Register* 48464), notice of proposed disapproval of the qualified facility program, EPA stated that the commission must revise its definition of best available control technology (BACT) in §116.10(3), General Definitions, to apply to the commission's minor NSR program only. The EPA stated in its final disapproval of the qualified facility program as published on April 14, 2010 (75 *Federal Register* 19470), stated that it is not taking final action on the definition of BACT, which it will delay until the final action on Texas's submission concerning NSR Reform (TCEQ Rule Project Number 2005-010-116-PR), and that the definition of BACT is severable from the qualified facility program. This adoption addresses the issue of BACT and its applicability to minor NSR as part of the qualified facility program and is discussed further in the SECTION BY SECTION discussion.

The 74th Legislature (1995) created the qualified facilities program in Senate Bill (SB) 1126. SB 1126 became effective on May 19, 1995, and amended the Texas Clean Air Act (TCAA) by revising the definition of "modification of existing facility," which changed the factors used to determine whether a modification has occurred. The commission interpreted this statute as applicable for minor NSR permitting purposes only. In 1996, Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, was revised to incorporate this legislative directive for minor NSR sources only.

Throughout this preamble, the commission's use of the term "major NSR" is intended as a reference to the NSR permit programs in Title I, Parts C and D of the Federal Clean Air Act (FCAA), the Prevention of Significant Deterioration (PSD) and nonattainment permitting; these permitting programs are commonly referred to as "federal permitting."

SB 1126 specifies exemptions from the definition of "modification of existing facility." It provides that changes may be made to existing facilities without triggering the statutory definition of modification of existing facility found in TCAA, Texas Health and Safety Code (THSC), §382.003(9)(E) if either of the following conditions are met: the facility has received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur, or regardless of whether the facility has received a preconstruction permit or permit amendment, uses control technology that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. Facilities that meet these requirements are designated as "qualified facilities."

The commission implemented SB 1126 through rules in Chapter 116, Subchapters A and B that frame the qualified facilities program and now confirms that these rules only apply to existing qualified facilities. The rules do not allow construction of a new facility, nor can a facility change result in a net increase in allowable emissions of any air contaminant, or allow the emissions of

an air contaminant category that did not previously exist at the facility undergoing the change. The use of the terminology in the phrase "net increase in allowable emissions of any air contaminant" in §116.116(e), Changes to Qualified Facilities, should not be confused with federal permitting terminology, where "net increase" has specific meaning as it relates to major NSR applicability involving comparison of actual emissions. The qualified facility program compares allowable emissions at one facility to allowable emissions of the same type at another facility at a single site. Prior to making this comparison, the owner or operator must determine if a project requires federal nonattainment or prevention of significant deterioration (PSD) review. This is accomplished by comparing a facility's baseline actual emission rate to the planned emission rate resulting from the change using either proposed actual emissions or the facility's potential to emit (PTE). This projected emission increase is then compared to a significance level for the pollutant involved. If the projected emissions increase equals or exceeds the significance level, the facility owner or operator must compute the result of all emissions increases and decreases at the facility according to the definition of contemporaneous period as defined in §116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions, to determine the net emission increase. If this net increase equals or exceeds a major modification threshold, then federal major NSR is triggered, and the proposed change cannot be authorized using a qualified facility claim. The significance levels and the major source thresholds are found in the definition of major modification in §116.12.

The commission has always administered the qualified facilities program as a minor NSR program and has not allowed its applicability for changes requiring major NSR. This is consistent with the requirements of the enabling statute in THSC, §382.0512, which states that "nothing in this section shall be construed to limit the application of otherwise enforceable state or federal requirements, nor shall this section be construed to limit the commission's powers of enforcement under this chapter." The program does not, and has not, superseded or negated federal permitting requirements. The qualified facilities program may not be used as a shield for protection or exemption from major NSR requirements. Persons making changes must maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review and Subchapter B, Division 6, Prevention of Significant Deterioration Review. A major modification, as defined in §116.12, may not occur and will be subject to a nonattainment and/or PSD review. Likewise, an owner or operator may not use qualified facility rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in 40 Code of Federal Regulations (40 CFR) Part 63, National Emission Standards for Hazardous Air Pollutants (NE- SHAP) rules. If a proposed project is determined to be a major modification under nonattainment and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a major NSR permit or major modification under the appropriate major NSR program and a minor NSR permit amendment. Further, the qualified facilities program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

EPA has acknowledged that the qualified facility program was intended, and has been administered, as a minor NSR program

(see September 23, 2009, *Federal Register* (74 *Federal Register* 48456)). It disapproved the program based on lack of specific rule requirements that would restrict the program to minor NSR, require netting procedures, and provide enforceability of any new emission limits under the qualified facility program (see April 14, 2010, *Federal Register* (75 *Federal Register* 19473)). The commission is adopting §116.116(e) that address these identified deficiencies through specific requirements for a separate netting analysis to determine the potential applicability of major NSR review to the proposed change, submission of a permit application to revise the permit, and certification of emissions. In addition to the specific rule requirements, the commission is structuring the rules to provide a clear sequence for facility owners and operators to determine whether their facility can be qualified. The rule changes address the specific concerns noted by the EPA in its disapproval, and are designed to allow the EPA to ultimately approve the qualified facilities program as a minor NSR program into the Texas SIP.

Use of the Term "Facility"

In the September 23, 2009, *Federal Register* (74 *Federal Register* 48450) notice of proposed disapproval, the EPA specifically solicited commission comment on the EPA interpretation of the use of the term "facility" in commission rules and Texas law as this is critical to EPA's understanding of the commission's permitting program.

The TCEQ does not concur with the EPA's understanding of Texas law in relation to the definition of "facility." Further, the EPA erroneously interprets the term "facility" as used in TCEQ rules by stating that, in part, a "facility" can be more than one major stationary source, and it can include every emission point on a company site without limiting these emission points to only those belonging to the same industrial classification (SIC code).

TCEQ and its predecessor agencies have consistently interpreted the term "facility" to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. In Texas, a facility cannot include more than one stationary source, nor can it include every emission point on a company site, even if limited to the same SIC code. THSC, §382.003(6) and §116.10(6) define the term "facility" as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility. A facility may constitute or contain a stationary source." A facility under Texas law can be subject to major NSR or minor NSR.

This interpretation of the term "facility" has been consistent by the TCEQ and its predecessor agencies for more than 30 years. Further, this definition has been approved into the Texas SIP, as acknowledged by the EPA in the September 23, 2009, *Federal Register* notice (74 *Federal Register* 48455 in footnote 4). The TCEQ provided comments regarding this issue in EPA's September 23, 2009, *Federal Register* notice, which are filed under Docket Number EPA-R06-OAR-2005-TX-0025 in the docket system at www.regulations.gov.

In order to be consistent with existing definitions in other rules of the commission, the term "account" is used to describe the range of a qualified facility transaction. The commission uses the term "account" synonymously with the EPA's use of "stationary source." The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally de-

fined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. As EPA noted in the September 23, 2009, *Federal Register* (74 *Federal Register* 48455, footnote 7) "account" is a SIP-approved definition. The EPA also acknowledges in the final notice of disapproval in the April 14, 2010, *Federal Register* (75 *Federal Register* 19489) that the term "facility" has been approved as part of the Texas SIP.

Grandfathered Facilities

EPA has expressed concerns about the use of qualified facilities changes by grandfathered facilities. The FCAA exempted facilities built prior to 1971 from compliance, provided that such facilities did not make changes that would trigger major NSR. This exemption was reflected in the TCAA prior to 2001. In 2001, the legislature adopted a revision to the TCAA, §382.05183, which required any facility constructed prior to 1971 (grandfathered facility) to either obtain or apply for an "existing facilities permit" by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971.

Prior to this requirement, grandfathered facilities that did not have a permit were operating in Texas. These facilities would have been allowed to use a qualified facilities change, but they would not have been allowed to make such a change if it would have triggered major NSR. The language of the qualified facility exemption from the definition in modification found in TCAA, §382.003(9)(E) clearly delineates the requirements for a qualified facility exemption. A facility is required to demonstrate that the change would not result in a net increase in allowable emissions, would not result in the emission of any air contaminant not previously authorized, and the facility would have to demonstrate that it is using BACT that is at least as effective as BACT that is no more than 120 months old.

A qualified facilities change cannot be used to authorize new construction, nor has the commission allowed this. Therefore, even if a grandfathered facility was allowed to make a qualified facilities change before obtaining a now required permit, such a qualified facility change would not have adversely affected ambient air quality. Such a change would have only allowed a site to move allowable emissions from one source to another within a site, but would not have allowed increases in total allowable emissions. Such a change would also have only been allowed if the facility could demonstrate that the change would have used BACT that was at least no older than 120 months. If an applicant for a qualified facilities change triggered federal major NSR, then application for a qualified facilities change would have been denied. Therefore, a grandfathered facility would not have been allowed to make a qualified facilities change that may have had an impact on ambient air quality. Currently, all facilities operating in Texas that emit air contaminants are required to have an air quality permit. Therefore, the commission has amended the qualified facilities rule to remove language that would have previously applied only to grandfathered facilities that were not required to have a permit. Any facility that applies for a qualified facility change is required to have a permit, and also required to apply for a revision to that permit, so that the qualified facilities change can clearly be reflected in the permit conditions.

Netting and Double Counting

The qualified facilities program can only be used if a physical or operational change to an existing facility complies with fed-

eral major NSR requirements. The statutory exemption from the definition of "modification of an existing facility" for minor NSR sources does not relieve an owner or operator from conducting an evaluation to determine if a major modification has occurred. Prior to seeking qualified facility status for their facilities, owners or operators must demonstrate that any increase in actual emissions must not trigger major NSR through comparison of baseline actual emissions to projected actual emissions or PTE. These comparisons may only be done for emissions at facilities located at a single site; comparison between emission sources at separate sites is not allowed for the necessary netting analysis. Therefore, the qualified facilities program requirements are at least as stringent as the federal requirements to conduct an evaluation to determine if a major modification has occurred.

Section §116.116(e)(3), states that in order to make a physical or operational change to a qualified facility, an owner or operator must demonstrate that any proposed change does not result in a net increase in allowable emissions of any air contaminant previously authorized under minor NSR at the same account. Under §116.116(e)(4) and (5), a qualified facility is allowed to demonstrate that a minor NSR modification has not occurred by comparing allowable emissions to allowable emissions, before and after a proposed change. Additionally, §116.116(e)(10) requires that no existing level of control can be reduced. The EPA also notes that the intent to require a separate netting analysis to be performed for each proposed change under the qualified facilities program is not explicitly stated (see April 14, 2010, *Federal Register* (75 *Federal Register* 19473)). Therefore, adopted §116.116(e)(11) corrects this identified deficiency by requiring that a separate netting analysis must be completed for each proposed change.

In the final notice of disapproval published on April 14, 2010 (75 *Federal Register* 19474), EPA identified an additional item that could not be approved as a SIP revision. In §116.116(e)(5)(B), the commission allows the interchange of air contaminants in the same category. After public comment on the proposed disapproval, EPA determined that this interchange is not approvable for all sulfur compounds, particularly hydrogen sulfide, and the commission did not demonstrate that such an interchange would protect the NAAQS for sulfur dioxide. The EPA also determined that an interchange of particulate matter 10 microns or less in diameter (PM₁₀) would not protect the NAAQS for particulate matter 2.5 microns or less in diameter (PM_{2.5}). EPA also addressed this subject in its comment letter on the commission's proposed rule amendments (April 16, 2010, issue of the *Texas Register* (35 *TexReg* 2978)) resulting from the disapproval of the qualified facility rules. The commission did not change the proposed rule in response to these comments because all interchanges must be demonstrated to not adversely affect air quality. This subject is further addressed in the RESPONSE TO COMMENTS section of this document.

For facilities undergoing an intraplant trade, where allowable emissions at one facility are increased while the allowable emissions at another facility are reduced within a single account, an allowable-to-allowable comparison is used only to determine if a net increase has occurred for minor NSR. The emissions are reviewed with the increase and reduction considered simultaneously and not covering a five-year period (contemporaneously) as for major NSR review. If a net emissions increase has occurred, an owner or operator cannot use the qualified facilities program to authorize the proposed project, and must find another state authorization method.

In addition, the owner or operator must submit notification before making an intraplant trade. This gives the commission the ability to evaluate any potential off-property effects relating to all contaminants, including contaminants that are subject to national ambient air quality standards. This intraplant trade capability exists only to the extent that the project is a minor NSR action.

New §116.116(e)(1) requires the evaluation of emissions related to physical and operational changes to be conducted on a baseline actual to either a projected actual or PTE basis as applicable. This comparison is used to determine if a net emission increase above the appropriate significance level for a major NSR permitting program has occurred. If the significance level is met or exceeded, the owner or operator must perform a netting analysis which is done using baseline actual and projected actual emissions and compares actual emissions increases and decreases at the facility during the contemporaneous period as defined in §116.12 to the emissions resulting from the proposed change. If the results of the netting analysis indicate that a major modification has occurred, the appropriate major NSR program is triggered and major NSR authorization must be obtained. In such a case, the qualified facilities program cannot be used and an NSR amendment must be obtained along with the appropriate major NSR authorization.

In addition, an anti-backsliding provision is included in the qualified facility rules, located in §116.116(e)(10). This rule states that "the existing level of control may not be lessened for a qualified facility." For physical and/or operational changes which involve intraplant trades, the maximum allowable emission rate listed in the maximum allowable emission rate table (MAERT) in the permit for the facility contributing emission reductions is reduced by the appropriate amount, while the limit in the MAERT for the facility receiving the emission increases is increased. If additional emission reductions are necessary to demonstrate that a net increase has not occurred, those reductions are also included in the changes to the MAERT in order to make them federally enforceable. The inclusion of the qualified facilities changes into the MAERT of the relevant permits ensures that the changes will not violate Texas control strategies or interfere with attainment of the NAAQS, interfere with reasonable further progress, control measures, or PSD increment.

Relaxation of SIP Requirements

The EPA expressed additional concern about the qualified facility program because it allows changes in facilities without necessarily obtaining a permit amendment and a subsequent upgrade of BACT. Qualified facilities may use BACT no older than 120 months, counting from the date of the permit issuance or amendment to the date of the proposed change. EPA stated that facilities making changes without a corresponding upgrade to BACT could represent a relaxation of SIP requirements.

The qualified facility program has only been applied to changes that do not trigger major NSR from its inception and is consistently, as well as exclusively, used only for minor NSR. Further, the qualified facilities program cannot be used in lieu of obtaining an amendment. Changes that would exceed major source thresholds are screened out of the qualified facility program, leaving only the minor modifications. Over the last fifteen years, about one percent of the commission's permitting actions have been for qualified facilities. The program does not allow the use of BACT that is older than 120 months; therefore, when combined with the minor modification only restriction and the relatively few number of qualified facility actions, the program does not adversely affect air quality and does not represent a relax-

ation of SIP requirements. Additionally, facilities making a qualified facilities change are not allowed to use BACT that is less stringent than what the facility is already using, regardless of how old that BACT may be. In addition to these rule amendments, the commission is submitting, as a SIP amendment, a separate document with additional explanation of the qualified facility program and a record of facilities where changes were sought under the qualified facility program to demonstrate that the qualified facilities program is and has consistently been at least as stringent as, and does not result in backsliding from, the approved Texas SIP. It is possible that some owners or operators may no longer claim these qualified facility changes or may no longer claim them at some point in the future. Therefore, this data is representative of the program at the point in time the data was collected and is not intended to be a static document or a revision to the SIP as a permit change that cannot be revised in the future in compliance with the applicable law.

Notification of Changes at Qualified Facilities

In §116.116(e)(2) the commission requires that facility owners or operators submit Form PI-E, Notification of Changes to Qualified Facilities, to provide notification of intended changes under the qualified facility program. The form requires details on the proposed qualified facility changes, including information on intra-plant trades and emission calculations to confirm that major NSR does not apply. Proposed changes under the qualified facility program are reviewed as part of the minor NSR program. Under the commission's minor NSR program, applications are required for new construction or modification. The form contains sufficient detail to allow review of proposed qualified facility changes similarly to an application for new construction or modification. This review has resulted in a significant denial rate for changes under the qualified facility program in nonattainment areas. The PI-E form is submitted to the commission's air permitting office in Austin and the appropriate regional office where it is publicly accessible in the permit file. Using the information on the form, the public may access more detailed information about proposed changes, including staff technical reviews.

In addition to the PI-E form, §116.116(e)(2)(A) requires owners and operators of facilities seeking a qualified facility change to submit an application for a revision to the relevant permits involved in the change, or a change in certification requirements if the change involves a standard permit or permit by rule (PBR). This allows the commission to incorporate the qualified facilities changes into the relevant permits, ensuring federal enforceability of the changes. By incorporating the changes into the permits, the commission ensures that the air quality benefits that existed before the qualified facilities changes will continue to be present and enforceable. Any additional future change at a qualified facility would have to undergo a separate review for federal applicability before making further changes. Therefore, the qualified facilities changes will have no adverse impact on the ambient air, Texas control strategies, or attainment of the NAAQS.

SECTION BY SECTION DISCUSSION

§116.10, General Definitions

The commission adopts the amendment to the opening paragraph of this section to refer to the Texas Clean Air Act rather than the acronym "TCAA."

The EPA has disapproved in its April 14, 2010 (75 *Federal Register* 19471) notice the definitions of "actual emissions" and "allowable emissions" in §116.10(1) and (2), respectively. Because these definitions apply only to the qualified facility program, the

commission is moving the definitions to new section §116.17, Qualified Facility Definitions, to restrict their use to the qualified facility program. The remaining definitions would be renumbered accordingly. Other changes in this rulemaking for adopted §116.116(e)(1), are intended to clarify qualified facility netting requirements.

In its proposed disapproval of the qualified facility program, the EPA states the commission must revise its definition of best available control technology in §116.10(3), now renumbered as §116.10(1), to clearly apply only for minor sources and minor modifications citation (see September 23, 2009, *Federal Register* (74 *Federal Register* 48450)). While EPA did not take action on the definition of best available control technology in the final notice of disapproval, the commission addresses this issue by separating the content of the definition in renumbered §116.10(1), and its application in §116.111(a)(2)(C), General Application. The commission adopts the amendment to the definition of BACT to define the term in a more descriptive manner using language to indicate the features of the term without using the term in the definition. The adopted definition will maintain its broad application to all NSR permitting actions conducted by the commission and thus maintain the stringency of permit review currently approved in the SIP, which is required by THSC, §382.0518. In the commission permitting process, the first determination is whether major NSR requirements are triggered. If so, then the BACT requirements of 40 CFR §52.21(b)(12) are applied. The commission's BACT process will then be applied for all air contaminants that are part of the permit, including any other air contaminants and any other facilities not subject to major NSR permitting requirements.

The commission adopts §116.10(9)(A) to state that insignificant increases of emissions that would not be considered modifications, are authorized under PBR rather than a "commission exemption." This amendment removes an obsolete term and specifies the commission's authorization method.

The commission deletes §116.10(9)(B), which refers to insignificant increases at a permitted facility. This circumstance is addressed by §116.10(9)(A) and has no other application under the commission's NSR permitting program. The subsequent subparagraphs are relettered.

The commission adopts the amendment to §116.10(9)(D)(ii) to delete the reference to ". . . regardless of whether a facility has received a preconstruction permit or permit amendment . . ." In response to a comment from EPA, the commission is removing language from §116.116(e)(2)(E) that refers to identical language. Adopted §116.116(1)(A) explicitly requires this authorization, and the commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required to obtain a permit after the implementation of the qualified facility program under SB 1126. The commission has concluded that the cited language has no application and can be removed. Subsequent paragraphs in the subsection are renumbered to reflect the addition of the new paragraphs.

§116.17, Qualified Facility Definitions

The commission adopts this new section to restrict the use of the definitions "actual emissions" and "allowable emissions" to the qualified facility program. The language in the definitions was written for specific application to qualified facilities, and the commission seeks to ensure that there is no confusion with applica-

tion of the terms in other permitting programs. The commission adds a citation referring to §116.116(e) in the definition of "actual emissions" to improve clarity. The commission also deletes the subparagraphs in the definition of "allowable emissions" that state how the term is applied for qualified grandfathered facilities because there is no further application of the qualified facility program for these types of facilities. The commission also amends language in §116.17(2)(C) to correctly reference the Air Quality Standard Permit for Pollution Control Projects.

The commission adopts the definition of "revision." This definition was not included in the rule proposal as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). In response to a comment from EPA, the commission has changed the rule language in §116.116(e)(2)(A) and (C) to refer to a permit revision instead of a permit alteration. Under §116.116(c), a permit alteration has specific meaning which cannot include increases in emission rates. The statutory basis for the qualified facility rules exempts facility changes from being a modification. The commission will revise the permit to include physical changes made under the qualified facility rule including emission increases and decreases and adjustments to the MAERT. This revision will also include reviews of all proposed qualified facility changes. The terms "revision" and "revise" have no specific meaning in the other NSR rules of the commission, and their use in this rule will be specific to qualified facility changes. The commission changed the proposed language in the opening sentence of the new section to correctly refer to "subchapter" instead of "part."

§116.111, General Application

The commission adopts the amendment to §116.111(a)(2)(A)(i) to correctly reference the Texas Clean Air Act instead of the acronym TCAA.

The commission adopts the amendment to §116.111(a)(2)(C) describing the application of BACT. The commission and predecessor agencies have interpreted the requirement for BACT to be applicable to all facilities, as defined in the TCAA, and to all contaminants that would be emitted from those facilities, as required by the TCAA. The federal definition, found in 40 CFR §52.21(b)(12), necessarily applies only to the major sources and major modifications under the federally-developed PSD permitting program. In addition, the federal requirements allow for netting by major sources, a process that allows exemption from federal permitting requirements. The scope of the Texas law is more comprehensive than that required for the federal permitting programs. The purpose of the amendment is to establish the commission's application of BACT, which applies to all facilities and all air contaminants after the evaluation of federal applicability and the corresponding application of the federal definition of BACT in 40 CFR §52.21(b)(12). The existing language in §116.111(a)(2)(C) describing BACT is deleted as unnecessary. On June 2, 2010, the commission amended §116.160, Prevention of Significant Deterioration Requirements, to include 40 CFR §52.21(b)(12), and therefore, §116.160 would be the appropriate reference in §116.111(a)(2)(C). However, until the changes to §116.160 were effective, the commission could not propose such a change. Therefore, this action changes the reference in §116.111(a)(2)(C) from the federal rule to §116.160(c)(1)(A), Prevention of Significant Deterioration Requirements.

The commission adopts the amendment to §116.111(a)(2)(D) and (F) to correct references to the CFR and the EPA.

The commission adopts the amendment to §116.111(a)(2)(K) to change a reference to Subchapter E instead of Subchapter C concerning rule regulating HAPs.

§116.116, Changes to Facilities

The EPA acknowledged that the commission intends the qualified facilities program to apply only to minor modifications for minor facilities and minor facilities at major sites, but states that rules require a clear limitation of the program to minor NSR changes (see April 14, 2010, *Federal Register* (75 *Federal Register* 19472)). Additionally, THSC, §382.0512, which authorizes the qualified facility program, specifically states that all applicable federal requirements, including major NSR review, will not be affected.

The commission adopts §116.116(e)(1) prohibiting the use of the qualified facility program for changes meeting the definition of "major modification" in §116.12. The commission uses the same restriction, which has been approved into the SIP, for facilities authorized under PBR in 30 TAC Chapter 106, Permits by Rule. The EPA states that this provision could allow circumvention of major modification applicability and therefore this language is also intended to address the EPA's concerns about the qualified facility program's use of allowable emissions in determining if a facility change will require reductions in actual emissions at another facility at the source. The language in the amendment restricts use of the qualified facility program to minor modification while still allowing the flexibility of the program as intended by the legislature. Prior to determining if a facility may use §116.116(e) as a qualified facility, owners or operators must make a determination of federal applicability. Facilities requiring major NSR cannot use the qualified facility program and must be authorized through permit amendment under a different program. Through use of a clear restriction of the qualified facility program to minor sources and minor modifications, the commission also addresses the EPA's concerns stated in its disapproval notice published on April 14, 2010 (75 *Federal Register* 19472).

The amendment addresses EPA requirements expressed in the EPA disapproval notice published on April 14, 2010 (75 *Federal Register* 19473) concerning an increase in allowable emissions at a qualified facility with a concurrent equivalent decrease in actual emissions at another facility located at the same TCEQ account number. The commission uses the term "account" synonymously with the EPA's use of "source." The separate netting analysis for each change would ensure that all net changes remain below major modification thresholds. The EPA disapproved the qualified facility program because it lacks a restriction that would prevent a major stationary source from offsetting significant emission increases by using reductions from outside the major stationary source. Adopted §116.116(e)(1) prohibits this action while still allowing trading within the same account. Section §116.116(e)(1) also states explicitly that facilities using the qualified facility program must be authorized under Chapter 116 or Chapter 106. In response to a comment from EPA, the commission is changing the reference in adopted §116.116(e)(1)(B) to correctly cite §116.12 as the definition of "net emission increase." As EPA notes, the correct citation should be §116.12(13) which is a SIP approved definition. The proposed citation was an incorrect reference. The commission will refer to §116.12 to limit the need for rule amendments to change citations in the event definitions are added or removed from the section.

The commission adopts §116.116(e)(2). In the federal notice published on April 14, 2010 (75 *Federal Register* 19473), the

EPA cites deficiencies in the enforceability, quantification, and permanence of emissions changes in the qualified facility program. Section 116.116(e)(2) provides specific rule requirements for holders of case-by-case permits, PBRs under Chapter 106, and standard permits to ensure no relaxation of the SIP. Section 116.116(e)(2) also contains language relating to enforceable permits, registrations, and certifications to ensure that facilities making emission reductions under the qualified facility program do not later increase emissions.

In addition, §116.116(e)(2) requires facility owners or operators to submit Form PI-E, Notification of Changes to Qualified Facilities, for any proposed qualified facility change. Adopted §116.116(e)(2)(A) requires owners or operators to simultaneously submit an application for permit revision for any facility involved in the qualified facility request that is authorized under §116.111 (this is a case-by case permit). This will allow the commission to begin the timely revision of all applicable permits to reflect changes under the qualified facility program.

In response to a comment from EPA, the commission has changed the rule language in §116.116(e)(2)(A) and (C) to refer to a permit revision instead of a permit alteration. Under §116.116(c), a permit alteration has specific meaning which cannot include increases in emission rates. The statutory basis for the qualified facility rules exempts facility changes from being a modification. The commission will revise the permit to include physical changes made under the qualified facility rule including emission increases and decreases and adjustments to the MAERT. This revision will also include reviews of all proposed qualified facility changes. The terms "revision" and "revise" have no specific meaning in the other NSR rules of the commission, and their use in this rule will be specific to qualified facility changes.

Adopted §116.116(e)(2)(B) requires owners or operators of facilities authorized by standard permit, which makes allowable emission reductions equivalent to emission increases at a facility authorized by a permit issued under §116.111, to submit a revision to the representations in the facility registration in accordance with §116.611, Registration to Use a Standard Permit.

Adopted §116.116(e)(2)(C) addresses facilities authorized under Chapter 106. If the proposed change at a facility authorized by PBR also involves a case-by-case permit issued under §116.111, then the §116.111 permit will be revised to reflect a new emission rate. If there is no §116.111 permit involved in the transaction, emission changes must be certified by a revision to the representations in the facility registration for a standard permit, or in the case of a PBR, a certified emission rate under §106.6, Registration of Emissions, through use of a PI-7-CERT or APD-CERT form. Either of these actions establishes an enforceable new allowable rate that cannot be changed without review.

The commission adopts §116.116(e)(2)(D) that states that no allowable emission rate in §116.17 may be exceeded to ensure that facilities making reductions under the qualified facility program do not later increase emissions.

Adopted §116.116(e)(2)(E) is included to ensure that facilities meet the BACT requirements for qualified facilities in §116.10(9). Section 116.116(e)(2)(E) also states that there will be no reduction of emission control efficiency to ensure that facilities reauthorized into a §116.111 permit do not reduce control efficiency if the §116.111 permit uses older control technology. In response to a comment from EPA, the commission is removing language from §116.116(e)(2)(E) that refers to ". . . regardless

of whether the facility has received a preconstruction permit or permit amendment" Adopted §116.116(1)(A) explicitly requires this authorization, and the commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required by legislative action to obtain a permit which occurred several years after the implementation of the qualified facility program under SB 1126. The commission has concluded that the cited language has no application and can be removed. Subsequent paragraphs in the subsection are renumbered to reflect the addition of the new paragraphs.

The commission adopts the amendment to §116.116(e)(2)(D) to correct a typographical error.

The commission adopts the amendment to §116.116(e)(4)(B) and (C) to delete the word "number." This updates the commission's use of the term "account" rather than "account number." As the EPA noted in the proposed disapproval as published on September 23, 2009 (74 *Federal Register* 48455, footnote 7), "account" is a SIP-approved definition.

The commission adopts the amendment to §116.116(e)(4), (5), and (9)(A) to revise citations reflecting the renumbering of the paragraphs within the subsection.

The commission adopts §116.116(e)(5) to require that a qualified facility transaction must occur at facilities located at the same account. The commission's use of the term "account" is equivalent with the EPA's use of "stationary source." The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally defined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. This amendment will ensure an accounting of permissible transactions under this qualified facility program. The commission also amends §116.116(e)(5)(A) to require that reductions in actual emissions used as emissions offsets be based on a 12-month rolling average rather than a calendar annual rate in order to provide a consistent and more accurate representation of emissions. The commission amends §116.116(e)(5) and (5)(A) to delete the term "offset." This term has a specific meaning in major NSR permitting and refers to a requirement that emissions decreases must be equal to or greater than proposed increases. The commission deletes this term to emphasize that the qualified facility program is a minor NSR program with netting requirements that are unique to the program and are performed only after a determination is made that major NSR does not apply.

In response to a comment, the commission is also amending §116.116(e)(5)(B) to allow the substitution of compounds that have been de-listed as a VOC for compounds that are currently listed as a VOC provided the compound being substituted is not regulated as a hazardous air pollutant and is not toxic. EPA removes compounds from its VOC list based on their low photo-reactivity, and the commission has determined that the authorized substitution can reduce emissions of VOC that react with nitrogen oxides and sunlight to produce ozone.

The commission amends §116.116(e)(5)(C) to include language moved from §116.116(e)(6)(E) stating that an emissions effects screening level will be determined by the executive director because the two subparagraphs concern the same subject.

The commission amends §116.116(e)(5)(E), removing language concerning effects screening levels and adding language

that requires a facility owner or operator to demonstrate that changes at qualified facilities will not adversely affect ambient air quality. The EPA acknowledges that the qualified facility program is structured at §116.117(b)(4), Documentation and Notification of Changes to Qualified Facilities, such that emissions moved closer to a property line are analyzed prior to a change occurring. The amendment is added to address an EPA identified deficiency as published on April 14, 2010 (75 *Federal Register* 19473), that the requirement should be made explicit in §116.116(e).

The commission amends §116.116(e)(6) to remove a reference to §116.118, Pre-change Qualification. The commission has determined the referenced section to have been applicable only to those facilities exempted from permitting under THSC, §382.0518(g). All of these facilities have since been required to obtain a permit, and §116.118 has no further application. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore, the commission cannot repeal the section in this adoption. The commission may consider the repeal of §116.118 in a subsequent rule action.

The commission adopts the amendment to §116.116(e)(9)(C) and (D) to require that reductions in actual and allowable emissions be based on a 12-month rolling average rather than a calendar annual rate in order to provide a consistent and more accurate representation of emissions.

The commission adopts §116.116(e)(11) requiring that a separate netting analysis be performed for each proposed change under this subsection. In the April 14, 2010, federal notice (75 *Federal Register* 19473), the EPA acknowledges the commission's intent that each proposed change under the qualified facility program was to be analyzed separately to ensure that emission increases and reductions used by facilities occur simultaneously. This amendment makes the requirement explicit.

The commission adopts the amendment to §116.116(f) to correct references to citations of the commission's emissions banking and trading rules in 30 TAC Chapter 101, General Air Quality Rules.

§116.117, Documentation and Notification of Changes to Qualified Facilities

The commission adopts language in §116.117(a)(4) requiring recordkeeping demonstrating that changes to qualified facilities meeting the requirements of §116.116(e) include information of how a determination was made that there would be no adverse effect on ambient air quality. In response to a comment from EPA, the language was made consistent with §116.116(e)(5)(E).

The commission received a comment from EPA concerning the timing of notices of qualified facility changes and the potential confusion of language in §116.117(b) and (c) concerning prior notification of changes implying that post-change notification may still be available. The commission has adopted clear requirements that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b) and (c) can be deleted.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because adopted

§116.116(e)(2) requires an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) are made redundant.

Section 116.117(c) requires that facilities with a preconstruction permit will have qualified facility changes incorporated into that permit when that permit is next amended or renewed. Section 116.116(e)(2) requires an application for a permit revision which means that the qualified facility changes will be incorporated once approved and §116.117(c) is no longer required.

§116.118, Pre-change Qualification

This section was proposed for amendment only in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission received a comment from EPA that it interprets this section as applying to grandfathered facilities. The commission agrees with EPA's interpretation of this section. Adopted §116.116(e)(1) requires that any facility seeking changes under qualified facility status must hold a current authorization under Chapter 116 or Chapter 106. No other method of qualification will be available, and the commission has determined the section has no further application. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore the commission cannot repeal the section in this adoption. The commission withdraws the proposed amendment to §116.118 and may consider the repeal of the section in a subsequent rule action.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of proposed rules is to amend various sections of Chapter 116 to address concerns expressed by the EPA regarding the commission's qualified facilities program in its review of the SIP. The changes to established rules for the qualified facilities program clarify that the rules regarding qualified facilities are restricted to minor changes regardless of the source classification. The adopted rules prescribe enforceable authorizations and a separate netting analysis to ensure that all net changes in emissions for the same account number remain below major modification thresholds. These changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The changes will allow the commission to incorporate proposed qualified facilities changes into the relevant permits, ensuring that the changes will have no adverse effects on ambient air quality, Texas air quality control strategies, and attainment of the NAAQS. The rules also modify the definition of BACT and clarify its permissible use. These changes will

continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with federal standards and do not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rules implement requirements of the FCAA. The rules are based on federal requirements for a permitting program and are necessary for federal approval of the Texas SIP. These rules are an express requirement of state law, but are proposed to meet the federal requirements for approval as a revision to the Texas SIP. The rules do not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §382.003(9) and §382.0518.

Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact assessment for this rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to qualified facilities and revise the definition and applicability of BACT in order to obtain federal approval of the rules into the Texas SIP. The rules do not create any additional burden on private real property. The rules do not affect private real

property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. This adoption also does not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking does not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The rules will benefit the environment by ensuring emission increases at certain facilities are combined with equivalent emission decreases at another facility at the same commission account number remain below all allowable emissions. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 116 requirements into their operating permit.

PUBLIC COMMENT

The commission held a public hearing on the proposal in Austin on May 10, 2010. The University of Texas Environmental Law Clinic on behalf of Citizens for Environmental Justice, Texas Environmental justice Advocacy Services, Community In-Power and Developmental Association, Air Alliance Houston, Lone Star Chapter Sierra Club, Environmental Integrity Project, Environmental Defense Fund, and Environment Texas (Environmental Groups); Environmental Integrity Project (EIP); GREEN Environmental Consulting (Green), Texas Chemical Council (TCC); Texas Industrial Project (TIP); and the United States Environmental Protection Agency (EPA) submitted comments during the public comment period, which closed on June 7, 2010.

RESPONSE TO COMMENTS

TCC supported the proposed amendments.

The commission appreciates the support.

Green commented that the commission should allow interchanges between VOCs and compounds like acetone that were once considered to be a VOC but were later declassified by EPA.

The commission has changed the rule in response to this comment. EPA removes compounds from its list of VOCs based on an individual compound's low reactivity with nitrogen oxides and sunlight to produce ozone. The commission has determined that a substitution that replaces more reactive VOCs with these types of less reactive compounds can improve air quality. The commission is amending §116.116(e)(5) to allow this substitution provided the compound that is being substituted is not regulated as a hazardous air pollutant and is not toxic. The commission prohibits the substitution of current VOCs in place of compounds that have been removed from EPA's VOC list.

Green commented that the TCEQ is using a BACT determination that does not apply economic reasonableness with consideration to small sources. Green requested that this condition be applied to small sources and allow a deviation from BACT as posted on the TCEQ Web site.

The commission has not changed the rule in response to this comment. BACT is based on accepted industry practices and readily available technology. If a facility owner or operator believes a different control technology is justified, a request should be made to the executive director, which will be evaluated as appropriate.

Green questioned the rule language in §116.116(e)(2)(D) as applied to allowable emissions and netting analysis and whether it should apply to allowable emissions at an account instead of referring to the definition of "allowable emissions" in §116.17 which considers allowable emissions at a facility.

The commission has not changed the rule in response to this comment. The language in §116.116(e)(2)(D) was added to prevent the reappearance of emissions at facilities that have made changes under the qualified facility rules. A facility is a discrete structure or piece of equipment that contains a source or air contaminants and is equivalent with the EPA term "emission unit." An account is an aggregation of sources under common ownership or control located on one or more contiguous properties and is equivalent to the EPA term "stationary source." The rules allow emissions transactions among facilities at an account provided the new emission rates are certified at each facility. Under the definition of allowable emissions in §116.17, these rates cannot be changed unless a new certification, registration, or application for revision is approved.

Environmental Groups commented that the qualified facility rules are unnecessarily complex and vague and make public participation and enforcement difficult.

The commission has not changed the rule in response to this comment. The commenters did not specify how or why the rules are unnecessarily complex and vague and make public participation and enforcement difficult, nor did they offer alternative rule language to address these concerns. The commission acknowledges that using the qualified facility program will require specific actions on the part of a facility owner or operator that are different than those required to obtain a permit amendment. The commission respectfully disagrees with the commenter that there are unnecessary complexities. The changes to the qual-

ified facility rules are needed to address the EPA identified deficiencies of the program as an amendment to the SIP, and the commission solicits specific recommendations on improvements to the rule for potential future actions.

Environmental Groups asked TCEQ to clarify how emission increases or reductions under the qualified facility program are considered in future federal netting analysis.

The commission has not changed the rule in response to this comment. Emissions increases and reductions at each affected facility under the qualified facility program are not considered modifications but must still be documented and maintained by the facility owner or operator and supplied to the commission. This has been, and remains a requirement of the program from its inception. The adopted rule requires certification of new emission rates through the submission of a permit application for revision, a revision to standard permit representations, or the submission of forms certifying a new federally enforceable emission rate for a PBR. The changes to §116.116(e) will require that an applicant for a qualified facility change also apply for a permit revision, which will allow the commission to make the necessary changes to an applicant's permits to ensure that the qualified facility change is recorded, permanent, and enforceable. Therefore, records of qualified facility changes become enforceable provisions of a facility's NSR authorization and part of the permanent record of the history of the facility. The history of changes is available to the commission to allow the performance and confirmation of future netting analyses and an accurate determination of whether any subsequent changes will require federal major NSR review.

Environmental Groups are concerned that various minor NSR authorizations may be used to authorize pieces of a larger project that would otherwise require major NSR review. They also commented that the qualified facility program may still be used to authorize significant emission increases at major sources that have netted out of major NSR. They quoted EPA that a "minor modification at a major source which results in a significant actual project emission increase that would require a netting demonstration to avoid major NSR applicability cannot be authorized under the qualified facility provisions."

The commission has not changed the rule in response to this comment. The qualified facility program has never been available as an authorization of a major modification. The commenter is correct that emission increases are allowed under the program, but these increases must be below significance thresholds for major NSR. The emissions increases allowed also do not increase the total allowable emissions that are authorized for a site. Because the total allowable emissions do not change, there is no threat to ambient air quality standards. Additionally, the qualified facility changes must be evaluated for local air quality effects to protect public health. In short, qualified facility changes are treated identically to changes at other NSR authorized facilities with regard to air quality effects. The qualified facility rules allow insignificant increases under a case-by-case permit, but these increases are documented, become part of the permit, and result in new enforceable limits. The cumulative increases at a qualified facility are treated identically to increases at non-qualified facilities. The emission changes are tracked and if a net increase equals or exceeds a federal netting threshold, federal major NSR is triggered.

EPA recognizes that, under the applicable Federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS,

and have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (73 *Federal Register* 72008, September 23, 2009). The commission has extensive records demonstrating that changes under the program are reviewed and, in some cases denied, in order to protect ambient air quality standards. EPA acknowledged the intent of the program as a part of minor NSR and the adopted rules provide a clear sequence of actions on the part of the owner or operator to ensure that a proposed qualified facility change does not require major NSR review. The commission has structured the adopted rules to explicitly state that a determination of federal applicability is always the first step in determining whether a change will be allowed under the qualified facility program. Under §116.116(5)(E), the facility owner or operator must demonstrate that a proposed change will not adversely affect ambient air quality. Without a successful demonstration, changes as a qualified facility will not be allowed.

Environmental Groups commented that the qualified facility rules are inadequate to protect air quality and do not provide the minimum required public participation. Environmental Groups quote requirements of the SIP in regard to a minor NSR program including the identification of the types and sizes of facilities, buildings, structures, or installations which will be subject to review and supporting air quality data. They stated that facilities subject to minor NSR must meet minimum public participation requirements including: a 30-day comment period; availability in one location of information submitted by the owner or operator and the agency's analysis of the effect of construction on ambient air quality; notice by prominent advertisement; and notice to EPA and local air pollution control agencies with jurisdiction.

The commission has not changed the rule in response to this comment. The commission respectfully disagrees that the qualified facility rules do not protect air quality. All emission increases under the qualified facility program must be demonstrated to not adversely affect air quality. The qualified facility program as authorized by SB 1126 was conceived and implemented as a minor NSR program, which states are free to develop. It is a common feature of the commission's minor NSR program that PBR and standard permit individual authorizations are not subject to public notice. Both of these programs have been approved into the Texas SIP. With regard to notice for standard permits and PBRs, each of those are adopted via separate processes, and have always been and remain exempt from the notice process for major and minor NSR case-by-case permits that previously applied in Chapter 116 (specifically §§116.130 - 116.137), as well as the rules adopted that implement House Bill (HB) 801(1999) and HB 2518 (2001). The notice process is approved by EPA in the SIP in §116.603 (see 73 *Federal Register* 53716 (September 17, 2008)). There is no requirement for notice for any claim for an individual standard permit, as EPA has acknowledged in comments on the commission's public participation rules as published on February 16, 2010, in the *Texas Register* ((35 TexReg 1749) see comments of EPA, Region 6 on Rule Project Number 2010-004-039-LS). PBRs are subject to notice at the time that each PBR is adopted by the commission. PBRs are found in 30 TAC Chapter 106, and are adopted under the rulemaking process in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, which requires notice of the proposed rule and an opportunity to comment, including that opportunity at a public hearing. Standard permits are authorized by THSC, §382.05195 and the rules in Chapter 116, Subchapter F. As with PBRs, the qualified facility rules have been subject to public comment and a public hearing prior to their adoption.

Larger facilities that may use the qualified facility rules will have been subject to public comment during consideration of an NSR case-by-case permit.

Environmental Groups and EIP commented that the qualified facility program does not protect air quality and cite research that permitted allowable emissions are often significantly above actual emissions. In such cases, increasing emissions to the allowable limit could jeopardize attainment of national ambient air quality standards. Additionally, the qualified facility program does not include legally enforceable procedures to ensure an increase will not violate a control strategy. TCEQ rules require a demonstration that qualified facility increases will not adversely affect air quality, but this demonstration is not required to be submitted to the commission, and only certain qualified facility changes require pre-change notification. Environmental Groups further commented that the qualified facility rules lack provisions to assure that any emission reduction is enforceable citing a lack of monitoring and reporting requirements. Environmental Groups commented that the qualified facility rules allow significant NSR modifications without public participation.

The commission has not changed the rule in response to this comment. It is common for a facility's allowable emission rate to exceed its actual emissions, and it is true that the qualified facility rules authorize an increase in actual emissions for a corresponding decrease in allowable emissions of the same contaminant category at the same site. This does mean that a facility may increase its actual emissions, provided a reserve of allowable emissions remains as an offset. When the original permit was issued, evaluation of whether the emission will comply with the NAAQS is based on the proposed allowable emissions, and the final allowable emissions must be in compliance with the NAAQS. Owners or operators of facilities seeking to make changes under the qualified facility rules must first demonstrate that the proposed change is not a major modification requiring major NSR. Once eligible to use the qualified facility rules, owners or operators must further demonstrate that the change will not adversely affect ambient air quality. If the change is approved, new emission rates become a part of the NSR authorizations for any facilities affected by the qualified facility action. This is accomplished through a permit revision, a change in representation of emissions, or a certification of emissions, all of which result in an enforceable emissions limitation.

Adopted §116.116(e)(2) requires a permit revision application be submitted and approved before any qualified facilities changes are made at a site. Therefore, the adopted rules require pre-change notification for all qualified facilities changes. The qualified facility rules do not allow a net increase in allowable emissions at the site. Instead, the program allows an applicant to trade allowable emissions of the same pollutant between different facilities at the same site. The overall allowable limit at the site does not change, and furthermore, these allowable emissions were demonstrated at the time the facilities were originally permitted to protect ambient air quality standards. A qualified facilities change may not result in new construction at a site. It can only be used to make minor changes to already permitted facilities at a single site without increasing the total allowable emission at a site. As addressed in a previous comment, the qualified facility program is a part of the TCEQ minor NSR program, and it is a common SIP-approved feature that individual authorizations are not always subject to public notice.

Environmental Groups commented that the term "facility" is vague and that TCEQ should modify its permitting terminology

to be consistent between the major and minor NSR program, and the FCAA.

The commission has not changed the rule in response to this comment. The commission acknowledges that its use of terms is different than those of the EPA. The term "facility" is codified in statute and means a discrete structure, enclosure, item, or piece of equipment that constitutes or contains a source of air contaminants. This is equivalent to EPA's use of the term "emissions unit." This interpretation of the term "facility" has been consistent by the TCEQ and its predecessor agencies for more than 30 years. Further, this definition has been approved into the Texas SIP, as acknowledged by the EPA in the September 23, 2009, *Federal Register* (74 *Federal Register* 48455, in footnote four). The commission cannot change its use of the term "facility" without violating state law. Even if this change could legally be made, the structure of the commission's other terminology related to permitting is dependent on the facility definition. This terminology is used throughout the commission's air quality rules and permits.

Environmental Groups commented that the proposed definition of BACT does not require the greatest reduction in emissions while meeting the requirements of obtainable, technically practical, and economically reasonable. They believe it is a weakening of the definition. They commented that the different definitions of BACT used by TCEQ and EPA are confusing and recommended that TCEQ use a different term such as TBACT.

The commission has not changed the rule in response to this comment. There is nothing weaker in the adopted state definition of BACT than the federal definition because BACT is ultimately determined on a case-by-case basis. The commission bases its definition and application of BACT on established industry and regulatory practices and applies its BACT review to all air contaminants and all facilities subject to case-by-case permitting without limitation to contaminants regulated under the FCAA. The application of BACT review under the TCAA is broader than the federal definition and therefore supplements federal review and helps ensure overall air quality. The commission has addressed a point of the EPA disapproval of the qualified facility program by adopting revisions to §116.111 explicitly applying the federal definition of BACT in cases where changes at facilities trigger federal major NSR. However, the TCAA requires the commission to consider BACT for all air contaminants, not just those that are federally regulated. The commission conforms to this statutory mandate but also meets its obligation to ensure that facilities undergo major NSR when it is applicable. If a qualified facility change requires federal major NSR, the federal definition of BACT, as codified in §116.160, will be applied for that review.

Environmental Groups commented that the use of PBR to authorize emission increases violates federal public participation requirements and allows variance from permit representations. Environmental Groups also commented that the notice and comment given for PBRs at proposal are not sufficient to meet public participation requirements because certain PBRs are not source specific. This does not allow a realistic assessment of potential air quality effects. In this category, Environmental Groups specifically mentions §106.261, Facilities (Emissions Limitations), and §106.262, Facilities (Emissions and Distance Limitations), as not being source specific. Environmental Groups commented that §106.263, Routine Maintenance, Start-up, and Shutdown of Facilities and Temporary Maintenance Facilities, allows the authorization of maintenance, start-up, and shutdown at any type of facility. Environmental Groups commented that generic PBRs

violate the THSC, which states that TCEQ may adopt PBRs "for certain types of facilities that will not make a significant contribution of air contaminants to the atmosphere" and that TCEQ is prohibited from adopting a PBR that would authorize a major facility. Environmental Groups also cited EPA comments that a PBR should be used only for small minor sources and is not a vehicle for major sources to supplement emission limits.

The commission has not changed the rule in response to this comment. The process of establishing PBRs has been approved by EPA as part of the Texas SIP. The listed PBRs were published for public comment prior to their adoption. These PBRs are not under consideration for rulemaking and are not part of the proposed amendments related to the EPA disapproval of the qualified facility program; therefore, this comment is beyond the scope of the current rulemaking.

Environmental Groups commented that the PBR rules allow information relevant to the effect of emissions to be included in the PBR registration and not a permit, making it unavailable to the public and not subject to review or comment.

The commission has not changed the rule in response to this comment. The rules concerning registration of PBRs are not under consideration for rulemaking and are not part of the proposed amendments related to the EPA disapproval of the qualified facility program; therefore, this comment is beyond the scope of the current rulemaking.

Environmental Groups commented that exemptions from the definition of "modification of existing facility" concerning flexible permits, multiple plant permits and changes at natural gas facilities should be deleted or given an effective date that is the date of any future SIP approval. These exemptions do not protect air quality.

The commission has not changed the rule in response to this comment. The use of flexible and multiple plant permits was not part of the qualified facility proposal, and the commission can take no action on these subjects in this adoption. The commission is addressing issues related flexible permits in a separate rulemaking, and it would be premature to delete references to that program in this adoption. The language related to natural gas processing facilities is consistent with statutory language in THSC, §382.003, Definitions, regulating these facilities.

TIP commented that the qualified facility program is an approvable SIP amendment as written and objects to the term "deficiency" as used in the preamble to describe the basis for EPA's disapproval of the program. They state that the term "deficiency" is inaccurate.

The commission has made no changes in response to this comment. The commission does not use the term "deficiency" as an admission that the qualified facility program was submitted as a SIP amendment that was not approvable. The commission deliberately uses the term to describe portions of the qualified facility program as "EPA identified deficiencies" to establish the basis for the commission's rule actions.

TIP disagreed with the characterization of the qualified facility program as an element of minor NSR. They state that the program is an exclusion from minor NSR for well controlled facilities by legislative design as SB 1126 specifically excluded qualified facility changes from being considered a modification.

The commission respectfully disagrees with this assessment of the qualified facility and has not changed the rule. Changes under the qualified facility program are reviewed for air qual-

ity effects and proper BACT. SB 1126 exempts qualified facility changes from being considered a modification but does not remove the need to evaluate changes for effects on air quality. Additionally, the qualified facility rules allow insignificant emissions increases within a maximum of allowed emissions that is protective of air quality. These are features of the Texas minor NSR program.

TIP disagreed with the addition of §116.116(e)(1), which specifically requires a determination of federal major NSR applicability prior to any facility changes being authorized under the qualified facility rules. TIP stated that THSC, §382.0512 prevents facilities from using the qualified facility program to avoid otherwise applicable major NSR requirements. They also stated that §116.117(a)(4) provides an additional safeguard against circumvention of federal requirements.

The commission has not changed the rule in response to this comment. The commission agrees with TIP that the qualified facility program has always contained safeguards against circumvention of major NSR requirements, and EPA acknowledges the intent of the program as an element of minor NSR. However, in its April 14, 2010, (75 *Federal Register* 19469), final disapproval of the qualified facility program, EPA maintains its position that the program is not clearly limited to minor NSR. Although the commission agrees that the statutory language is clear, the adoption of rule language to implement the legislative intent removes the ambiguity identified by EPA as a deficiency in the qualified facilities rule. Section 116.116(e)(1) is adopted to specifically address this issue.

TIP commented that the commission should retain the option in §116.117 that allows facility owners or operators to make a post-change notification of a qualified facility change. TIP also objected to the proposed revisions to §116.116(2) requiring the submission of a permit application for qualified facility changes.

The commission has not changed the rule in response to this comment. In its notice of proposed disapproval as published on September 23, 2009 (74 *Federal Register* 48462), EPA specifically requires that an application must be submitted for each participating qualified facility to ensure enforceability of qualified facility changes.

TIP commented that the proposed definition of BACT in §116.10 be withdrawn. They stated that the current definition is SIP-approved and is well supported by guidance and precedent. Replacing the current definition would render this guidance obsolete. TIP also stated the commission has addressed EPA concerns with the adoption of the BACT referenced definition in 40 CFR §52.21(b)(12) under TCEQ Rule Project 2010-005-116-PR.

The commission has not changed the rule in response to this comment. The commission agrees that the amendment to §116.160 under the cited rule project number addresses EPA concerns about the use of the federal definition of BACT for projects requiring federal review. The TCAA requires that BACT be applied to all facilities and all air contaminants in permits issued by the commission and is not limited to applications for PSD and nonattainment permits. The commission conducts a detailed review of BACT for all projects and regulated pollutants. The adopted definition more clearly expresses the concept of BACT than does the definition it replaces. The new definition is consistent with existing guidance and any changes to that guidance will not be a major issue.

EPA commented that the background of the rulemaking stated the qualified facility program allows increases in actual emis-

sions with a corresponding decrease in allowable emission at another facility and that this is inconsistent with its understanding of the program as involving allowable emissions only. EPA stated that its understanding was that actual emissions were only used within the context of grandfathered facilities and that references to actual emissions appear throughout §116.116(e). EPA requested clarification of the intent of the qualified facility program.

The statements in the rule preamble are correct. The qualified facility program does allow increases in actual emissions as part of the minor NSR program. The program is based on the exemption from the applicability of "modification" for facility changes that involve minor increases in emission rates. In the proposed notice of program disapproval as published on September 23, 2009 (74 *Federal Register* 48458 - 48459), there is extensive discussion of the commission's netting procedures and the need to use actual emission increases in making a determination of federal major NSR applicability. This was one of the major points of program disapproval. Although the qualified facilities program has always required such a netting procedure as a matter of program implementation, the commission has clarified the rule to specifically require the use of actual emissions for determination of major NSR applicability.

Like other elements of the Texas minor NSR program, the basis for the qualified facility program is a limit on net allowable emissions. The permitted net allowable emissions at a site cannot be increased thus protecting ambient air quality standards. This meets the intent of the minor NSR program, which is to allow insignificant actual emission increases within an allowable emission envelope that protects ambient air quality standards.

Since its inception, the program has been used for insignificant increases at authorized facilities following a review for major NSR applicability. The amendments to the qualified facility program adopted by the commission will clarify its intent, specifically to remove any potential ambiguities as identified by EPA.

EPA questioned whether the commission may disapprove changes as noticed on a PI-E form and whether the commission has an established time to respond to the noticed changes. They questioned whether a default approval exists. EPA also noted that language in §116.117(b) implies that prior notification is only required when intraplant trading moves emissions closer to a property line. Section 116.117(b) also requires a PI-E as part of a facility annual report. EPA requested clarification on the use of the PI-E form.

The commission has changed the rule in response to this comment. Under the adopted amendments to the qualified facility program, the PI-E form serves as notice that changes are being made under the qualified facility rules and establishes a new federally enforceable emission rate for facilities authorized under Chapter 106. New emission rates for facilities authorized under a standard permit will be made federally enforceable through an update to the representations in the facility's registration. Under adopted §116.116(e)(2) prior notification is required for all qualified facility changes, and the commission has modified language in §116.117 to prevent any confusion.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because the new requirements in §116.116(e)(2) require an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) is made redundant. Therefore, §116.117(b)(3) and (4) is deleted from the rules.

EPA recommended that the commission include in its rules a specific limitation on the use of the term "facility" to an emissions unit similar to language in §116.160(c)(3). EPA stated that the term "facility" is applied in different ways without providing clarification in rule language, and its recommended action would clearly limit what a facility is under the qualified facility program.

The commission has not changed the rule in response to this comment. The definition of "facility" is an approved SIP amendment that has the same meaning when used in the qualified facility program as in other air permitting programs of the commission. The rule language in §116.160(c)(3) cited by EPA is not a limitation of the definition of "facility" but an expression of the term's equivalency with EPA's "emission unit."

EPA commented that the commission should further revise its qualified facility rules to include a definition of "account" to clearly indicate it is synonymous with EPA's "source."

The commission respectfully disagrees with this comment. It is not necessary to move this definition to the qualified facility rules. An account is an aggregation of sources under common ownership or control located on one or more contiguous properties and is equivalent to the EPA term "stationary source," which includes these concepts. The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally defined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. The definition of "account" is located in §101.1, Definitions, where it applies to all air rules of the commission.

EPA recommended rule language for addition to the definition of BACT in §116.10 to limit this definition to air contaminants and facilities not subject to federal permitting requirements.

The commission has not changed the rule language in response to this comment. The TCAA requires that BACT be applied to all facilities and all air contaminants in permits issued by the commission and is not limited to applications for PSD and nonattainment permits. The commission is adopting language in §116.111(2)(C) which clearly applies the state definition of BACT to facilities subject to the TCAA. The same adopted language also states that the BACT definition in 40 CFR §52.21(b)(12) will be applied to facilities requiring major NSR review.

EPA requested an explanation of why the definition of "qualified facility" has been retained in §116.10 rather than moved to §116.17.

The commission has not changed the rule in response to this comment. The term "qualified facility" may be used in other rules of the commission and in currently issued permits. The commission has determined that changing the rule citation for the location of the definition would unnecessarily complicate the interpretation of these rules and permits.

The definition of "allowable emissions" in §116.17(2) states that the term would include the emission limit established in a MAERT and any emission rate in the representation on a permit application. EPA stated this might lead to double counting of emissions and asked for verification that the rates are not cumulative.

The emission rates placed in a MAERT are based on representations in a permit application. Once emission limits are placed in the MAERT, they override any emission rate representations made in the permit application.

EPA requested an explanation of the term "special exemption facility" in §116.17(2)(D).

The commission has changed the rule in response to this comment. The commission has deleted §116.17(2)(D), as the referenced term "special exemption facility" is obsolete. The commission has also removed the references to prior notification, as adopted §116.116(e)(2) will require all facilities that make a qualified facilities change to notify the commission prior to making the change, and apply for a revision to the applicable permits to ensure that the qualified facilities changes are federally enforceable.

EPA noted the citation of §116.12(20) in §116.116(e)(1)(B) and noted that it is evaluating pending revision to §116.12 and that §116.12(20) must be approved before further action on the qualified facility program.

The commission has changed the rule in response to this comment. As EPA notes, the correct citation should be §116.12(13), which is a SIP-approved definition. The proposed citation was an incorrect reference. The commission will refer to §116.12 to limit the need for rule amendments to change citations in the event definitions are added or removed from the section.

EPA commented that §116.116(e)(2)(A) requires the submittal of an application for a permit alteration to document certain qualified facility changes. The SIP-approved alteration provisions in §116.116(c)(B)(iii) state that a permit alteration is a change that does not cause an increase in the emission rate of any air contaminant. EPA stated that the terms of the alteration provisions should be changed. Environmental Groups commented that the use of the term "alteration" should not apply to the qualified facility rules as it could be used to increase actual emissions provided there is a decrease in allowable emissions.

The commission has changed the rule in response to this comment by replacing the word "alteration" with the word "revision." Although the commission intends this rule change to be restricted to applications within the qualified facilities program, the commission agrees that the use of the word alteration may be confusing in this context. The qualified facility rules and the statutory authorization in SB 1126 allow increases in actual emissions at a facility provided that there is a corresponding decrease in allowable emissions of the same pollutant at another facility at the same site, and exempts these increases from being considered a modification, thus removing the requirement for a permit amendment. Therefore, the commission is using the word revision in this rule, to indicate that changes in the conditions and/or emission rates that will be applied to a permit when a qualified facilities change is made, and that those permit changes are fully enforceable. "Revision" will also be defined in the qualified facilities definitions section in §116.17.

EPA commented that §116.116(e)(2)(D) contains a typographical error.

EPA is correct and the commission has deleted the unnecessary word "in."

EPA commented that a portion of the final disapproval of the qualified facility program was based on the lack of need for an underlying permit. EPA cited the language in §116.116(e)(2)(E) which states in part ". . . regardless of whether the facility has

received a preconstruction permit or permit amendment" and stated that this language must be revised to be consistent with the stated intent of the commission in §116.116(e)(1) that a facility must hold an authorization under Chapter 106 or Chapter 116.

The commission has changed the rule in response to this comment. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 (commonly referred to as a "grandfathered facility") to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. To address EPA's concern and ensure that the rule language reflects current statutory requirements and the commission's implementation of the rule, adopted §116.116(e)(1)(A) explicitly requires a facility to possess such an authorization. The commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required to obtain a permit after the implementation of the qualified facility program under SB 1126. The commission has concluded that the cited language has no further application and can therefore be removed. For consistency, the commission is also removing identical language from §116.10(9)(D)(ii).

EPA commented that the interchange of sulfur compounds allowed under §116.116(e)(5) would include sulfur dioxide and hydrogen sulfide which are both regulated NSR pollutants and would require separate netting analyses. This interchange of compounds is not an approvable SIP amendment. EPA cited the same difficulties when considering PM₁₀ and PM_{2.5}.

The commission has not changed the rule in response to this comment. Under the conditions of §116.116(e)(5)(E), an applicant for a qualified facilities change must demonstrate that the change will not adversely affect air quality before the change will be approved by the commission. Accordingly, the commission has decided that it is unnecessary to specifically prohibit interchanges of sulfur dioxide and hydrogen sulfide, or PM₁₀ and PM_{2.5}. If an applicant proposes an interchange and cannot demonstrate that it will not adversely affect ambient air quality, then such a change would be disapproved by the commission.

The commission recognizes that sulfur dioxide and hydrogen sulfide are dangerous compounds with disaster potential. A demonstration of an acceptable interchange between these substances will be difficult and subject to intense review before approval. However, the commission has determined that allowing the interchange, should an applicant be able to make the appropriate demonstration, could reduce the potential harmful effects of these substances. The commission is also aware that demonstrations of the relative health effects of PM₁₀ and PM_{2.5} and their interchange are not fully developed. Without an approved and replicable demonstration, such an interchange would not be allowed, but the commission does not want to prohibit potential air quality benefits if future developments allow a successful and replicable demonstration.

EPA commented that §116.116(e)(5)(E) requires a demonstration that a change under qualified facilities will not adversely affect ambient air quality. Section 116.117(a)(4) requires an owner or operator to maintain sufficient information to show that a project is not expected to adversely affect ambient air quality standards which appears to be a less stringent requirement.

EPA commented that the two paragraphs should be made consistent and to explain the replicable procedure the commission will use to determine the change will not adversely affect air quality.

The commission has changed the rule in response to this comment to make the sections consistent. The commission uses established modeling procedures to determine air quality effects. Applicants for qualified facility changes must conform to these procedures in demonstrating that qualified facility changes will not adversely affect air quality, and the results obtained by the applicant must be replicable by the commission.

EPA cited the language in §116.116(e)(8)(A) concerning BACT and requested confirmation that only state BACT can apply to a minor NSR program and that this section should be revised to limit BACT application to the state definition. EPA asked for an explanation of the replicable procedure to determine a control method as effective as state BACT.

The language in §116.116(e)(8)(A) is applicable only in the qualified facility rules and is limited to minor NSR and the definition of BACT in §116.10. The state definition of BACT is a comprehensive definition that must be applied to all air contaminants under the requirements of the TCAA. In cases where a change to a facility requires major NSR review, the federal definition of BACT must also be applied to that change. These are encompassing requirements under the TCAA and apply to all NSR permitting actions by the commission. Adopted §116.116(e)(1)(B) requires that any applicant for a qualified facility change bear the initial burden of determining federal applicability prior to seeking authorization for a qualified facility change, and the commission confirms the determination. As explained previously in this response, an applicant determines federal applicability using actual emissions, as required by both TCAA and FCAA.

Applicants for alternative BACT must conform to established procedures and identical or better emission reductions in demonstrating that alternative BACT is equivalent, and the results obtained by the applicant must be replicable by the commission.

The preamble states that §116.116(e)(10) contains anti-backsliding language stating that no existing level of control may be reduced and that the MAERT will be adjusted to show new emission rates under the qualified facility program. EPA commented that no rule language requires an adjustment to the MAERT and that commission should include this revision.

The commission has not changed the rule in response to this comment. Changes to the MAERT are made anytime a new emission rate is established in a case-by-case permit. The adopted rule changes at §116.116(e)(2) require a revision to a permit at the time a qualified facilities change is made. This revision will allow the qualified facilities changes to be added into the permit, which includes changing the MAERT to reflect any changes in emissions rates. These changes are not unique to the qualified facility rules and are needed to maintain current permit requirements.

EPA commented that §116.117(b)(1) must be revised to reduce the interval between the time a change is made and when the commission is notified with an annual report. EPA also commented that this paragraph should be revised to require reporting for changes with intraplant trading. EPA noted the deletion of the provision for post-change notification but still finds the regulations vague. EPA commented that the commission should expressly state that pre-change notification is required for all qualified facility changes.

The commission has changed the rule in response to this comment. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. In order to address EPA's concern and ensure that the rule language reflects current statutory requirements and the commission's implementation of the rule, adopted §116.116(e)(1)(A) explicitly requires a facility to possess such an authorization. The changes to the rule that the commission has adopted clarify the commission's implementation of the qualified facilities program by providing explicit requirements in the rules that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b) and (c) can be deleted.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because the new requirements in §116.116(e)(2) require an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) is made redundant. Therefore, §116.117(b)(3) and (4) is deleted from the rules.

Section 116.117(c) requires that facilities with a preconstruction permit will have qualified facility changes incorporated into that permit when that permit is next amended or renewed. Section 116.116(e)(2) requires an application for a permit revision which means that the qualified facility changes will be incorporated once approved, and therefore, §116.117(c) is no longer required.

EPA commented that §116.117(b)(2) requires pre-change notification if a change will affect compliance with a permit special condition and requested an explanation of what constitutes a special condition. They asked if this would allow removal of federally required monitoring or reporting.

The commission has changed the rule in response to this comment and is deleting the cited subsection for the reasons stated in the previous comment and response. The term "special conditions" of the permit is a matter of nomenclature and such conditions are developed specifically for the permit that they are a part of (see SIP-approved §116.115(c)). A special condition is not a separate category of conditions. Changes under §116.116(e) are not made to delete monitoring or reporting requirements, nor would federally required monitoring or reporting requirements be removed as part of a change made by a qualified facility.

The changes to the rule that the commission adopted clarify the commission's implementation of the qualified facilities program by providing explicit requirements in the rules that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b). Because the new requirements in §116.116(e)(2)

require an application for a permit revision and the submission of a PI-E form, the requirement for a post-change notice is obsolete. Section 116.117(b)(2) applied to post-change notifications and was therefore proposed for deletion.

EPA commented that it interprets §116.118 as applying to grandfathered facilities and asked the commission to explain what other facilities may be affected by this section. If the section is solely applicable to grandfathered facilities, EPA recommended it be deleted. If it applies to other types of facilities, EPA recommended that it be clarified.

The commission is changing the proposed rule in response to this comment. The commission agrees with EPA's interpretation that this section of the rule is only applicable to grandfathered facilities. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. Adopted §116.116(e)(1) makes explicit that any facility seeking changes under qualified facility status must hold a current authorization under Chapter 116 or Chapter 106. No other method of qualification will be available. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore the commission cannot repeal the section in this adoption. The commission withdraws the proposed amendment to §116.118 and may consider the repeal of the section in a subsequent rule action.

EPA commented that the proposed SIP supplement document does not address grandfathered facilities which did not have underlying Chapter 116 authorizations. The SIP supplement should identify which facilities were grandfathered and the commission should provide verification that these facilities are now authorized.

By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants.

The commission also notes that any owner or operator of a grandfathered facility wanting to make changes under the qualified facility rules at any point during the facility's existence would have been required to update the facility control technology to meet the BACT requirements of the rules. Once a permit was issued, there was no reason to identify facilities as grandfathered in the air permitting database as that is irrelevant for qualified facility program purposes.

EPA commented that the portion of the proposed SIP supplement entitled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to accurately reflect the requirements of §116.116(e)(1)(A) that a facility must be authorized before it can become a qualified facility and that references to BACT are limited to state BACT.

The commission has made the appropriate changes to the SIP supplement.

EPA commented that Appendix 4 - SB 1126 Guidance must be updated to reflect EPA concerns and commission corrections applicable to the qualified facility program and the updated guidance should be submitted to EPA.

The guidance will be updated if the rule amendments are adopted and will reflect EPA concerns and all related rule changes. The guidance document was included with the proposed rule amendments as an indication of how the commission has administered the qualified facility program. The commission's Air Permits Division will update its guidance document after these rules become effective. It will be made available on the commission's web site for Air Permits Division. The commission is not submitting the guidance document to EPA for revision to the SIP.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.10, §116.17

STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment and new section are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The new section and amendments implement Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and 382.0518.

§116.10. General Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Best available control technology (BACT)--An air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emissions reduction can be achieved through technology such as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice.

(2) Dockside vessel--Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(3) Dockside vessel emissions--Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

- (A) loading and unloading of liquid bulk materials;
- (B) loading and unloading of liquified gaseous materials;
- (C) loading and unloading of solid bulk materials;
- (D) cleaning and degassing of liquid vessel compartments; and
- (E) abrasive blasting and painting.

(4) Facility--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

(5) Federally enforceable--All limitations and conditions which are enforceable by the United States Environmental Protection Agency (EPA), including:

(A) those requirements developed under Title 40 of the Code of Federal Regulations (CFR) Parts 60 and 61 (40 CFR Parts 60 and 61);

(B) Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR Part 63));

(C) requirements within any applicable state implementation plan (SIP);

(D) any permit requirements established under 40 CFR §52.21;

(E) any permit requirements established under regulations approved under 40 CFR Part 51, Subpart I, including permits issued under the EPA-approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program; or

(F) any permit requirements established under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(6) Grandfathered facility--Any facility that is not a new facility and has not been modified since August 30, 1971.

(7) Lead smelting plant--Any facility which produces purified lead by melting and separating lead from metal and nonmetallic contaminants and/or by reducing oxides into elemental lead. Raw materials consist of lead concentrates, lead-bearing ores or lead scrap, drosses, or other lead-bearing residues. Additional processing may include refining and alloying. A facility which only remelts lead bars or ingots for casting into lead products is not a lead smelting plant.

(8) Maximum allowable emissions rate table (MAERT)--A table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility.

(9) Modification of existing facility--Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into

the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more permits by rule under Chapter 106 of this title (relating to Permits by Rule);

(B) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(C) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, under the TCAA, §382.057, from preconstruction permit requirements;

(D) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has been exempted under the TCAA, §382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(E) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(F) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, §382.060, as that section existed prior to September 1, 1991.

(10) New facility--A facility for which construction is commenced after August 30, 1971, and no contract for construction was executed on or before August 30, 1971, and that contract specified a beginning construction date on or before February 29, 1972.

(11) New source--Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(12) Nonattainment area--A defined region within the state which is designated by the EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, §107(d).

(13) Public notice--The public notice of application for a permit as required in this chapter.

(14) Qualified facility--An existing facility that satisfies the criteria of either paragraph (9)(D)(i) or (ii) of this section.

(15) Source--A point of origin of air contaminants, whether privately or publicly owned or operated.

§116.17. Qualified Facility Definitions.

The words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to a change to a facility under §116.116(e) of this title (relating to Changes at Facilities). This rate cannot exceed any applicable federal or state emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title.

(2) Allowable emissions--The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this paragraph. This rate cannot exceed any applicable state or federal emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title.

(A) Permitted facility--For a facility with a permit under this chapter, the allowable emissions shall be any emission limit established in the permit on a maximum allowable emissions rate table and any emission limit contained in representations in the permit application which was relied upon in issuing the permit, plus any allowable emissions authorized under Chapter 106 of this title (relating to Permits by Rule).

(B) Facility permitted by rule--For a facility operating under Chapter 106 of this title, the allowable emissions shall be the least of the emissions rate allowed in Chapter 106, Subchapter A of this title (relating to General Requirements), the emissions rate specified in the applicable permit by rule, or the federally enforceable emission rate established in accordance with §106.6 of this title (relating to Registration of Emissions).

(C) Standard permit facility--For a facility authorized by standard permit, other than the Air Quality Standard Permit for Pollution Control Projects, the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.

(D) Special exemption facility--For a facility operating under a special exemption, the allowable emissions shall be the emissions rate represented in the original special exemption request.

(3) Revision--A change made in the conditions or emission rates of a permit issued under §116.111 of this title (relating to General Application), or to the representations in the registration for a standard permit issued under Subchapter F of the chapter (relating to Standard Permits) to codify physical changes or new emission rates as authorized by §116.116(e) of this title (relating to Changes at Facilities).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005393

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**SUBCHAPTER B. NEW SOURCE REVIEW
PERMITS**

DIVISION 1. PERMIT APPLICATION

30 TAC §§116.111, 116.116, 116.117

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The amendments implement Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and 382.0518.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the

intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under Title I Part C of the Federal Clean Air Act (FCAA) shall evaluate and apply BACT as defined in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements).

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA) under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR Part 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine

compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

§116.116. Changes to Facilities.

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:

(1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and

(2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section, the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

- (A) a change in the method of control of emissions;
- (B) a change in the character of the emissions; or
- (C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Gov-

erning Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

- (A) a decrease in allowable emissions; or
- (B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:
 - (i) a change in the method of control of emissions;
 - (ii) a change in the character of emissions; or
 - (iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

- (A) result in an increase in off-property concentrations of air contaminants;
- (B) involve a change in permit conditions; or
- (C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.

(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.111(a)(2)(C) of this title.

(5) Permit alterations are not subject to the requirements of §116.111(a)(2)(C) of this title.

(d) Permits by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in §116.115 of this title (relating to General and Special Conditions).

(2) All changes authorized under Chapter 106 of this title to a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.

(1) Prior to determining if this subsection may be applied to a proposed change to a facility, the following will apply:

(A) The facility must be authorized under this chapter or Chapter 106 of this title.

(B) A separate netting analysis shall be made for each proposed change to determine the applicability of major New Source Review by demonstrating that any increase in actual emissions is below the threshold for major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions). Proposed changes exceeding the major modification threshold cannot be authorized under this subsection. This analysis shall meet the definition and requirements of net emissions increase in §116.12 of this title.

(2) Prior to changes under this subsection, facility owners or operators will submit Form PI-E, Notification of Changes to Qualified Facilities, and the following additional requirements will apply:

(A) Facility owners or operators will simultaneously submit, where applicable, an application for a permit revision for each permit issued under §116.111 of this title involved in the qualified facility transaction.

(B) Owners or operators of facilities authorized under Subchapter F of this Chapter, (relating to Standard Permits) shall submit a revision to the representations in the facility registration in accordance with §116.611 of this title (relating to Registration to Use a Standard Permit).

(C) Any applicable permit issued under §116.111 of this title will be revised to reflect changes under this subsection to facilities authorized under Chapter 106 of this title. If no applicable permit issued under §116.111 of this title is involved in the qualified facility transaction then changes shall be certified by a registration for an emission rate under §106.6 of this title (relating to Registration of Emissions).

(D) No allowable emission rate as defined in §116.17 of this title (relating to Qualified Facilities Definitions) shall be exceeded.

(E) The facility has received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur, or uses control technology that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. There will be no reduction in emission control efficiency.

(3) Notwithstanding any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(4) In making the determination in paragraph (3) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and

(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account that are not included in subparagraph (B) of this paragraph.

(5) The determination in paragraph (3) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of an air contaminant category or compound above the allowable emissions for that air contaminant category or compound, there must be an equivalent decrease in emissions at the same facility or a different facility at the same account.

(A) The equivalent decrease in emissions shall be based on the same time periods (e.g., hourly and 12-month rolling average

rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged. Emissions of substances that were, but are not currently, listed as a volatile organic compound (VOC) by the United States Environmental Protection Agency (EPA) may be substituted for emissions of compounds currently listed by EPA as a VOC as referenced in §101.1 of this title (relating to Definitions) provided the compound being used as a substitute is not regulated as a hazardous air pollutant and is not toxic. The substitution of current VOCs for compounds that have been removed from the VOC list by EPA is prohibited.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds. The effects screening level shall be determined by the executive director.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The facility owner or operator shall demonstrate that the change will not adversely affect ambient air quality.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(6) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities).

(7) As used in this subsection, the term "physical and operational change" does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions, and recordkeeping that are required by a permit.

(8) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as best available control technology (BACT) required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.

(9) For purposes of this subsection and §116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (4) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and 12-month rolling average) as the allowable emissions for the

facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or 12-month rolling average).

(10) The existing level of control may not be lessened for a qualified facility.

(11) A separate netting analysis shall be performed for each proposed change under this subsection.

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.376(b) of this title (relating to Discrete Emission Credit Use) if all applicable conditions of §101.376 of this title are met. This subsection does not authorize any physical changes to a facility.

§116.117. Documentation and Notification of Changes to Qualified Facilities.

(a) Persons making changes under §116.116(e) of this title (relating to Changes to Facilities) shall maintain documentation at the plant site demonstrating that the changes satisfy §116.116(e) of this title. If the plant site is unmanned, the regional manager may authorize an alternative site to maintain the documentation. The documentation shall be made available to representatives of the commission upon request. The documentation shall include:

- (1) quantification of all emission increases and decreases associated with the physical or operational change;
- (2) a description of the physical or operational change;
- (3) a description of any equipment being installed; and
- (4) sufficient information as necessary to show that the project will not adversely affect ambient air quality and will comply as applicable with:

(A) §116.150 and §116.151 of this title (relating to Nonattainment Review) and §§116.160 - 116.163 of this title (relating to Prevention of Significant Deterioration Review); or

(B) Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(b) Nothing in this section shall limit the applicability of any federal requirement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6090



CHAPTER 328. WASTE MINIMIZATION AND RECYCLING

SUBCHAPTER F. MANAGEMENT OF USED OR SCRAP TIRES

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§328.52, 328.55, 328.60, 328.63, 328.66, and 328.69 - 328.71; and the repeal of §328.67 and §328.68.

Sections 328.52, 328.63, and 328.66 are adopted *with changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2991) and are republished. Sections 328.55, 328.60, and 328.67 - 328.71 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2008, comments received by the scrap tire program requested that the executive director facilitate the ability of local officials and fire marshals to review and have input on applications for scrap tire facilities and Land Reclamation Projects Using Tires (LRPUT). This rulemaking requires applicants to request input from local authorities, including fire authorities, and resolve any noncompliance issues with local requirements before an application may be approved. Provisions requiring some level of coordination with local government officials are amended to require applicants to provide proof of notice and to prohibit the executive director from issuing authorizations if local governments provide timely notice that an application does not comply with local requirements.

The existing rules required that an applicant provide the executive director a copy of written notification which was provided to local government officials for some types of applications and not for others. The revisions require that applications include proof of notice to local government officials in all applications for LRPUTs and scrap tire facilities. The executive director is prohibited from authorizing a scrap tire facility or a LRPUT if a local government provides timely notice that an application does not comply with local requirements. These amendments apply to applications filed after these amendments become effective and applications filed before then are subject to the former rules.

The amendments clarify that LRPUTs are subject to annulment, suspension, revocation, denial, and motions to overturn. LRPUT applications are required to include information about groundwater levels in the area, and the executive director may request additional information about groundwater levels at the proposed site.

Other changes in this rule package focus on updating the rules to refer to the Texas Commission on Environmental Quality rather than the Texas Natural Resource Conservation Commission, allowing submittal of electronic documents, and clarifying the exemption from the time frame requirement to split, quarter, or shred off-the-road tires before disposal but allowing for the executive director to grant exceptions as warranted by circumstance.

This rulemaking repeals the outdated portions of the rules which refer to parts of the Scrap Tire Program, which are no longer supported by the underlying statutory provisions which were repealed or expired in 1997.

SECTION BY SECTION DISCUSSION

§328.52, Applicability

Adopted §328.52(d) clarifies rules implementing an existing statutory requirement in Texas Health and Safety Code (THSC), §361.112(f), which prohibits disposal of scrap tires unless the tires are shredded, split, or quartered. This statutory provision also authorizes the commission to grant exemptions to this requirement as warranted by the circumstances. The existing rule provided that scrap tires that were off-the-road tires intended for use on heavy machinery were exempt from the time frame requirement to be split, quartered, or shredded when stored at a storage site or a permitted landfill. This rule has been interpreted by some landfill operators to authorize them to dispose of these tires whole, and the proposed amendment would have expressly provided that these tires could not be buried whole. After considering comments, the rule has been amended to track the statutory provision to allow the executive director to grant exemptions to dispose of these tires whole.

§328.55, Registration Requirements

Adopted §328.55(1) changes the reference from the Texas Natural Resources Conservation Commission to the Texas Commission on Environmental Quality. Adopted §328.55(6) makes LRPUT authorizations subject to annulment, suspension, revocation, and denial.

§328.60, Scrap Tire Storage Site Registration

Adopted §328.60(b)(4) provides for electronic submittals as allowed by the executive director in lieu of hard copy documents. Adopted §328.60(b)(9)(A)(i) corrects outdated address information for the United States Geological Survey and the Texas Department of Transportation. Adopted §328.60(b)(9)(A)(ii) corrects outdated address information regarding where topographic maps can be obtained.

§328.63, Scrap Tire Facility Requirements

Adopted §328.63(c)(3) allows an application to register a scrap tire facility to be submitted in a manner allowed by the executive director, which facilitates electronic submittals. While the commission is seeking to accommodate electronic submittals, the rule is intended to allow discretion to the executive director to require the submittal of original hard copy documentation as necessary. Adopted §328.63(d)(1) requires applicants to provide notice to local governments. Adopted §328.63(d)(1) also requires the owner or operator of a scrap tire facility to mail a copy of the notification documents to the appropriate local officials and fire authorities and provide proof of mailing in the form of return receipts for registered mail. The rule requires the executive director to consider any timely written notification from local governments regarding compliance with local requirements. Adopted §328.63(d)(2) and (4) allow local officials 45 days to reply to notice from applicants.

Adopted §328.63(d)(4) changes the existing requirement for an applicant for a scrap tire energy recovery facility, one type of scrap tire facility, from having to provide a letter of approval from the fire marshal to having to provide proof of notice. The change of this existing requirement is made in order to maintain consistency with the requirements for other types of scrap tire facilities. The executive director is required to consider any timely written notification from local fire authorities regarding compliance with local requirements. This change addresses the concern expressed by some tire facility owners that the application process should not be delayed by local governments' failure or refusal to respond to opportunities to provide input.

Revisions were made since proposal in response to comments to require that: a local government's notice of noncompliance relate to managing scrap tires and protecting public health and the environment; a notice of noncompliance include adequate documentation of the noncompliance; the executive director determine whether any documentation of noncompliance submitted is adequate; and, that the executive director disregard a notice of noncompliance if a court with jurisdiction over a local government's decision rules that an application complies with local requirements. Section 328.63(d)(7) was added in response to comments, to provide that the term "local government" is defined in THSC, §361.003(17).

§328.66, Land Reclamation Projects Using Tires (LRPUT)

Adopted §328.66(a) allows an application for a LRPUT to be submitted in a manner allowed by the executive director, which facilitates electronic submittals. Section 328.66(a) was proposed to authorize the executive director to withhold authorization or request additional information for a LRPUT application for reasons related to protecting public health and the environment. In response to comments, the proposed amendment to §328.66(a) related to withholding LRPUT authorizations is not adopted. Adopted §328.66(a)(6) requires applicants to provide a demonstration of the seasonal high water level in the area and authorizes the executive director to request additional information about groundwater levels at the site. Adopted §328.66(a)(10) adds groundwater districts to the list of entities to be notified of applications. Adopted §328.66(a)(10) and (d) require the executive director to consider any timely written notification from local governments regarding compliance with local requirements. Adopted §328.66(a)(10) and (d) allow local officials 45 days to reply to notice provided by applicants. Revisions were made since proposal in response to comments to require that: a local government's notice of noncompliance relate to managing scrap tires and protecting public health and the environment; a notice of noncompliance include adequate documentation of the noncompliance; the executive director determine whether any documentation of noncompliance submitted is adequate; and, the executive director disregard a notice of noncompliance if a court with jurisdiction over a local government's decision rules that an application complies with local requirements.

Section 328.66(n) was added in response to comments, to provide that the term "local government" is defined in THSC, §361.003(17).

§328.67, Special Authorization Priority Enforcement List (SAPEL)

This rulemaking repeals §328.67 which addressed the Special Authorization Priority Enforcement List (SAPEL). This rule is no longer necessary after projects were completed and the underlying statutes expired or were repealed in 1997.

§328.68, Priority Enforcement List (PEL) Program

This rulemaking repeals §328.68 which addressed the Priority Enforcement List (PEL). This rule is no longer necessary after projects were completed and the underlying statutes expired or were repealed in 1997.

§328.69, Public Notice of Intent to Operate

Adopted §328.69(d) changes the reference from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

§328.70, Motion for Reconsideration

The title of §328.70 is updated to refer to a Motion to Overturn instead of a Motion for Reconsideration. Adopted §328.70 authorizes persons affected by a LRPOT application to file a Motion to Overturn. Adopted §328.70 also updates cross references to the correct Chapter 50 rules.

§328.71, Closure Cost Estimate for Financial Assurance

Adopted §328.71(h)(3) changes the reference from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking is intended to protect the environment and reduce risks to human health, but it is not expected to adversely affect the economy in a material way. The amended application requirements only apply to new applications, so they will generally not cause any expense to existing facilities. For new applications, the additional requirements and coordination with local governments and fire authorities are not expected to result in a significant expense.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the rules do not meet any of these applicability requirements. First, there are no standards set for authorizing these types of facilities by federal law and the rulemaking is not required by state law. Second, the rules do not exceed an express requirement of state law. There are no specific statutory requirements for authorizing these types of facilities. Third, the rules do not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not propose the rules solely under the general powers of the agency, but rather under the authority of: THSC, §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, which governs the storage, transportation, and disposal of used or scrap tires. Therefore, the commission does

not adopt the rules solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed an assessment of whether the rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the rulemaking is to facilitate the ability of local officials and fire authorities to review and have input on applications for scrap tire facilities and LRPOTs. This rulemaking requires applicants to provide additional information and request input from local authorities before an application may be approved. The executive director is prohibited from approving an application if a local government provides timely notice that an application does not comply with local requirements. Input from local governments is expected to make these facilities more protective of public health and the environment.

The rules, including provisions related to coordination with local governments, do not impose a burden on a recognized real property interest and therefore do not constitute a taking. The promulgation of the rulemaking is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the rulemaking does not affect a landowner's rights in a recognized private real property interest because this rulemaking neither: burdens (constitutionally) or restricts or limits the owner's right to the property that would otherwise exist in the absence of this rulemaking; nor would it reduce its value by 25% or more beyond that value which would exist in the absence of the rules. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENT

The commission held a public hearing on May 11, 2010. The comment period closed on May 17, 2010. The commission received comments from Abilene Environmental Landfill, Inc. (AEL), the City of Brownwood (CB), and Barrett & Smith, PLLC on behalf of Liberty Tire Recycling (LTR) and Santa Anita, LLC (SA). Barrett & Smith, PLLC had originally identified United Tire Wholesale as a commenter, but then requested the comments only be considered on behalf of LTR and SA. Two commenters were against specific changes only; a third commenter was in support of most of the changes, but against others and suggested changes.

RESPONSE TO COMMENTS

§328.52, Applicability

Comment

AEL and CB stated that the requirement to split, quarter, or shred oversized tires prior to disposal is unnecessary and will place an undue financial burden on landfills and taxpayers. CB comments that the proposed change would result in increased illegal dumping; that most cities and towns do not have equipment capable of splitting, quartering, or shredding oversized tires; and the freight costs to transport the tires to facilities capable of complying with the new requirement would result in an undue burden on the generator or town in which the tires would be illegally dumped. AEL states that the existing rule is reasonable and that the proposed change does not further the protection of the environment or human health and is more stringent than the United States Environmental Protection Agency's rule.

Response

The commission agrees that the executive director should not be prohibited from issuing a registration by a local government providing notice of noncompliance. This provision was changed in response to comments to require the executive director to consider any timely written notice from local governments. The language proposed in §328.52(d) was intended to make this rule consistent with THSC, §361.112(f) and existing rule 30 TAC §330.15(e)(4). THSC, §361.112(f) requires that tires be shred, split, or quartered prior to disposal, but it also authorizes the commission to grant exceptions to this requirement. Existing §330.15(e)(4) provides that whole used or scrap tires shall not be accepted for disposal or disposed of in any municipal solid waste landfill, unless processed prior to disposal in a manner acceptable to the executive director. After considering comments, the rule has been amended to track the statutory provision to allow the executive director to grant exemptions to allow landfills to dispose of these tires whole. The commission agrees that there may be circumstances where the risk of disposing of these tires whole is outweighed by the technical difficulty and cost of processing. The main concern the commission has with disposing of tires whole is the potential for impacting the stability and integrity of a fill area. The rule has been amended to authorize the executive director to grant exceptions to the requirement to process these tires based on considering the circumstances. This amendment is intended to authorize the executive director to consider the specific circumstances of a landfill operator and to tailor any exemptions to minimize any potential negative impacts from disposing of these tires whole.

§328.63, *Scrap Tire Facility Requirements*

Comment

LTR and SA state that the proposed changes would prohibit the executive director from issuing a registration if a local government notifies the executive director that the project violates any local requirement. They believe that this proposal runs counter to the state approval process by prohibiting the executive director from approving an application on the basis of a local government stating that the project violates a local requirement. LTR and SA further state that the proposed language does not require the local government to give reasons why and how the project violates a local ordinance or require the ordinance to be relevant to managing scrap tires. They state that the rule as written does not allow the executive director to inquire of the local government the nature of the noncompliance or to prove the noncompliance. They request that the term "local government" be clarified as to whether it includes a groundwater district or a regional council of governments. They comment that if it does include those entities, it would be conferring on them powers outside the scope of their authority. They also object to the rule not requiring the

local authority to work with the applicant on meeting the local requirements. LTR and SA recommend that §328.63(d)(2) and (4) be stricken.

Response

The commission agrees that the executive director should not be prohibited from issuing a registration by a local government providing notice of noncompliance. This provision was changed in response to comments to require the executive director to consider any timely written notice from local governments. The commission agrees that compliance with local requirements under this rule should be limited to considering compliance with requirements related to managing scrap tires and protecting public health and the environment. The amendment has been changed to limit consideration to local requirements related to managing scrap tires and protecting public health and the environment. The commission agrees that local governments providing notice of noncompliance should be required to provide information about how the application does not comply. The amendment was changed in response to comments to require a local government's notice of noncompliance to include adequate documentation of the noncompliance and to authorize the executive director to determine whether any documentation of noncompliance submitted is adequate.

The commission agrees that applicants should have a mechanism to challenge local government's determination of noncompliance. Language has been added acknowledging that applicants can challenge determinations by local governments and that the executive director shall disregard such notice of noncompliance if a court with jurisdiction over a local government's decision rules that an application complies with local requirements.

The commission agrees that the term "local government" should be defined to clarify whether water districts or regional council of governments would be considered to be local governments under these provisions. This rule was amended in response to comments to provide that the term "local government" has the meaning defined in THSC, §361.003(17). Neither water districts nor regional council of governments would be considered to be a local government under this rule.

§328.66, *Land Reclamation Projects Using Tires (LRPUT)*

Comment

LTR and SA object to the language in §328.66(a) stating that the executive director may withhold authorization "for good cause relating to protecting human health and the environment." They state that there is no standard for the executive director to review, and they question the need for the new language. LTR and SA believe that the language puts an extra burden on LRPUT applicants that applicants for Scrap Tire Storage Sites and Scrap Tire Facilities do not have to meet. Commenters recommend that the language concerning withholding for good cause relating to protecting human health and the environment be stricken.

Response

The commission agrees with the comment to the extent that it may not be appropriate to rely on the proposed language as an independent subjective basis for withholding LRPUT authorizations. This provision was intended to authorize the executive director to withhold authorizations based on making a cumulative determination considering compliance with all of the applicable rules. The commission amended §328.55(6) to expressly provide that LRPUT applications may be denied for specified reasons. The amendment to §328.55(6) addresses the commis-

sion's main concern that there needs to be clear authority to deny LRPUT applications. In response to comments, the proposed amendment to §328.66(a) related to withholding LRPUT authorizations is not adopted.

Comment

LTR and SA comment that the language in §328.66(a)(6) allowing the executive director to require applicants to demonstrate the seasonal high groundwater table is unwarranted, expensive, and can cause long delays in the application process. They state that the TCEQ has already found, and that nationwide studies support, that tire shreds placed below the water table have negligible effect on water quality. They suggest that the proposed language be stricken.

Response

The commission respectfully disagrees that requiring a demonstration of the groundwater table is unwarranted, expensive, and that it would cause long delays. Groundwater levels could affect the design and operation of a LRPUT. If groundwater is standing in excavations during filling operations, an operator would need to have plans for managing the groundwater and may need to modify the mixture of fill materials. Filling below the groundwater table may warrant adding additional protections to prevent the use of tire material contaminated with other substances. While the LRPUT rules are generally based on the commission's understanding that tire shreds pose a minimal risk to groundwater, some studies have shown that there can be some leaching from tire shreds. Tire shreds may also be contaminated with other substances, in which case, operators may need to take precautions to use only uncontaminated tire material in areas below the groundwater table. Obtaining groundwater level information in LRPUT applications could also be useful if the commission chooses to study impacts from LRPUTs on groundwater.

As to the expense of providing a demonstration of the seasonal high groundwater level, the amendment is intended to allow flexibility and minimize expense for applicants. The requirement to provide general groundwater level information for the "area" is intended to allow applicants to use existing information at minimal cost. The commission expects that providing existing information of groundwater levels for an area will be adequate for most LRPUT applications. In the cases where it appears that a LRPUT fill area will extend below the water table, the executive director should be authorized to request additional information about groundwater at the specific site. In regard to whether providing a demonstration of groundwater levels causes delay, the commission would not expect any delay in processing applications that rely on existing data for the area. There could be a delay of six months to a year in those cases where the executive director requests a site-specific demonstration of the seasonal high groundwater level. No changes were made to this amendment in response to comments.

Comment

LTR and SA state that the proposed changes to "§328.66(a)(10) and (11)(d)" would prohibit the executive director from issuing a registration if a local government notifies the executive director that the project violates any local requirement. They believe that this proposal runs counter to the state approval process by prohibiting the executive director from approving an application on the basis of local government stating that the project violates a local requirement. LTR and SA further state that the proposed language does not require the local government to give reasons why and how the project violates a local ordinance or require the

ordinance to be relevant to managing scrap tires. They state that the rule as written does not allow the executive director to inquire of the local governmental authority the nature of the noncompliance or to prove the noncompliance. They request that the term "local government" be clarified as to whether it includes a groundwater district or a regional council of governments. They comment that if it includes those entities, it would be conferring on them powers outside the scope of their authority. They also object to the rule not requiring the local government to work with the applicant on meeting the local requirements. LTR and SA recommend that "§328.66(a)(10) and (11)(d)" be stricken.

Response

The commission understands that the commenters' references to §328.66(a)(10) and (11)(d) were intended to reference §328.66(a)(10) and (d). The commission agrees that the executive director should not be prohibited from approving an application for a LRPUT by a local government providing notice of noncompliance. This provision was changed in response to comments to require the executive director to consider any timely written notice from local governments. The commission agrees that compliance with local requirements under this rule should be limited to considering compliance with requirements related to managing scrap tires and protecting public health and the environment. The amendments have been changed to limit consideration to local requirements related to managing scrap tires and protecting public health and the environment. The commission agrees that local governments providing notice of noncompliance should be required to provide information about how the application does not comply. The amendments were changed in response to comments to require a local government's notice of noncompliance to include adequate documentation of noncompliance and to authorize the executive director to determine whether any documentation of noncompliance submitted is adequate.

The commission agrees that applicants should have a mechanism to challenge a local government's determination of noncompliance. Language has been added acknowledging that applicants can challenge determinations by local governments and that the executive director shall disregard such notice of noncompliance if a court with jurisdiction over a local government's decision rules that an application complies with local requirements.

The commission agrees that the term "local government" should be defined to clarify whether water districts or regional council of governments would be considered to be local governments under these provisions. This rule was amended by adding §328.66(n) in response to comments, to provide that the term "local government" is defined in THSC, §361.003(17). Neither water districts nor regional council of governments would be considered to be a local government under this rule.

Comment

LTR and SA suggest that the language in §328.66(a)(11) requiring that notice of a LRPUT application be published in adjacent counties be changed to notice in any adjacent counties within five miles of the proposed facility.

Response

The commission agrees that it may be appropriate to amend the requirement in existing §328.66(a)(11) to publish notice of LRPUT applications in adjacent counties, but that change may be beyond the scope of this rulemaking. The commission decided

not to change that requirement in this rulemaking, but to consider that issue in a separate rulemaking.

30 TAC §§328.52, 328.55, 328.60, 328.63, 328.66, 328.69 - 328.71

STATUTORY AUTHORITY

These amendments are adopted under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits; Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The proposed amendments implement THSC, §361.061 and §361.112.

§328.52. Applicability.

(a) This subchapter does not preempt local ordinances regarding the management of used or scrap tires that are as or more stringent than the regulations in this subchapter. All persons or facilities regulated by this subchapter must comply with all applicable local ordinances that are not inconsistent with the regulations in this subchapter. A local ordinance is not inconsistent with this subchapter if a regulated person or facility can simultaneously comply with both the state and local requirements.

(b) This subchapter applies to persons that are involved in the generation, transportation, processing, storage, utilization, and disposal of used or scrap tires or tire pieces that are classified as municipal solid waste, recyclable materials, or inert fill materials. This subchapter does not apply to whole used or scrap tires that are classified as industrial solid waste.

(c) All used or scrap tires or tire pieces, except for tires collected incidentally by municipal solid waste collection vehicles, are subject to manifesting by generators according to the requirements in §328.58 of this title (relating to Manifest System).

(d) Scrap tires that are off-the-road tires intended for use on heavy machinery, including, but not limited to, an earth mover/dozer, a grader, or mining equipment are exempt from the time frame requirements to be split, quartered, or shredded when stored at a registered storage site or a permitted landfill. These tires must be shredded, split, or quartered prior to disposal in a manner acceptable to the executive director. The executive director may grant exceptions to this requirement as warranted by the circumstances.

§328.63. Scrap Tire Facility Requirements.

(a) *Applicability.* This section applies to owners or operators of facilities that process, conduct energy recovery or recycle used or scrap tires or tire pieces.

(b) *Storage site registration requirement.* The applicant shall obtain a scrap tire storage site registration in accordance with §328.60 of this title (relating to Scrap Tire Storage Site Registration) if the applicant seeking registration for a scrap tire facility:

(1) intends to have more than a 30 calendar day supply of tires at the facility site; or

(2) is solely a scrap tire processing facility with no recycling or energy recovery conducted on-site and intends to store in excess of 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in trailers.

(c) *Scrap tire facility registration requirements.* Scrap tire facilities shall register their operation with the executive director in accordance with §328.55 of this title (relating to Registration Requirements) before starting operations. An application for registration shall be made on a form provided by the executive director upon request. In addition to the General Registration requirements, the following registration information must be provided to the executive director.

(1) Persons that process, conduct energy recovery or recycle used or scrap tires or tire pieces shall submit an application for a registration number from the executive director for the operation of the scrap tire facility.

(2) The application for registration shall be prepared and signed by the applicant. The application shall identify the use of the tires (e.g., the product to be made and the end use market), and shall include information necessary for the executive director to make an evaluation of the proposed operation.

(3) The application for registration of a scrap tire facility shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director.

(4) Data presented in support of an initial or renewal application for a scrap tire facility shall consist of the following information:

(A) an application form provided by the executive director and location map(s) pursuant to §328.60 of this title;

(B) the maximum amount of tires (in pounds) that will be on the scrap tire facility at any given time;

(C) the amount of tires necessary to provide a 30 calendar day raw material supply for the proposed recycling process;

(D) the storage method (piles on the ground, piles inside a building or enclosure, or totally enclosed and lockable containers that are locked during non-operational hours);

(E) the product to be manufactured and the end use market;

(F) a property owner affidavit on a form provided by the executive director pursuant to §328.60 of this title; and

(G) a list of all other applicable federal, state, and local permits and/or registrations with the associated numbers;

(5) Persons that conduct energy recovery shall obtain all other applicable authorizations (i.e., permits and/or registrations) necessary for conducting tire related activities before submitting an application for registration as a scrap tire facility.

(d) *General requirements.*

(1) The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate regional council of government; and, to the appropriate local fire authority. Proof of mailing shall be provided in the form of return receipts for registered mail.

(2) Where local ordinances require controls and records more stringent than the requirements of this subchapter, scrap tire facil-

ity operators shall use those criteria to satisfy commission requirements under this section. Prior to authorizing a scrap tire facility, the executive director shall consider any timely written notification by a local government with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements related to managing scrap tires and protecting public health and the environment. Such notice shall include adequate documentation of noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard a notice of noncompliance if a court with jurisdiction over a local government's decision determines that an application complies with local requirements. Local governments shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director.

(3) Stockpiles of used or scrap tires or tire pieces at the processing location that are awaiting splitting, quartering, shredding, processing, or recycling shall be monitored for vector control and appropriate vector control measures shall be applied when needed, but in no event less than once every two weeks.

(4) If a scrap tire facility does not intend to provide its own fire fighting personnel or system, the facility shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. Prior to authorizing a scrap tire facility, the executive director shall consider any timely written notification by a local fire authority with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Such notice shall include adequate documentation of the noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local fire authority's decision determines that an application complies with local requirements. Local fire authority officials shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director.

(5) The owner or operator of the scrap tire facility shall operate the vehicles and equipment to prevent nuisances or disturbances to adjacent landowners.

(6) A scrap tire facility operator shall submit to the executive director an annual summary of facility activities from January 1 through December 31 of each calendar year, showing the number and type of scrap tires received, amount by weight of tires shredded, processed, burned for energy recovery or recycled, and the amount by weight of tire pieces removed from the facility. If the tire pieces were delivered to an end user, the annual report shall include the name of the end user, type of end user and the date of delivery to the end user. The annual report shall be submitted no later than March 1 of the year following the end of the reporting period. The report shall be prepared on a form provided by the executive director.

(7) The term "local government" as used in this section is defined in Texas Health and Safety Code, §361.003(17).

§328.66. Land Reclamation Projects Using Tires (LRPUT).

(a) Any person or entity intending to initiate a Land Reclamation Projects Using Tires (LRPUT) shall notify the executive director in writing of the intent to fill land by means of a LRPUT. The application shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director. Owners/operators of LRPUTs are required to provide information to the executive director as part of the notification document as described in this subsection. Approval in writing by the executive director (authorization to proceed) is required before the reclamation project may be initiated.

The executive director may withhold authorization to proceed if the information submitted is not deemed to be complete. The executive director shall have 60 days to review the notification documents for completeness. The executive director may request additional information if the executive director determines that the notification submittal does not address all applicable requirements of this subchapter or any potential risks to public health or the environment. The following information shall be submitted in the notification document or attachments thereto.

(1) The owner/operator of the LRPUT shall disclose in the notification the location of the project on a state highway map, United States Geological Survey map or similar, and provide a legal description of the property. The general location on the site where fill activities will take place shall be shown on one or more of these maps;

(2) A property owner's affidavit shall be submitted at the time of notification of intent to initiate a LRPUT and shall include the following:

(A) legal description of the property on which the LRPUT will occur; and

(B) acknowledgment that the owner has a responsibility to file with the county deed records an affidavit to the public advising that a reclamation project utilizing tire pieces exists on the site, and providing details about the location of the filled area within the property boundaries, areal extent of the fill project, coordinates or survey data, and the approximate volume or weight of tires which were used as fill, at such time as the fill project has been completed;

(3) The approximate volume of tire pieces proposed to be placed below ground, or the equivalent number of whole tires, and the approximate size and depth of the depression or borrow area to be filled shall be disclosed in the notification document;

(4) The approximate period of time during which the project will be conducted shall be disclosed, with estimated start and finish dates;

(5) The method of placement and commingling of the tire shreds to achieve a mix of tire pieces with the inert fill material in a proportion no greater than 50% of tire material by volume.

(6) A demonstration of the seasonal high groundwater level in the area. The executive director may require that an additional demonstration be provided for the seasonal high groundwater level at the proposed site based on the demonstration provided for the area. If the executive director requires an additional demonstration of the seasonal high groundwater level at the proposed site, the applicant shall provide the requested information within the time frame specified by the executive director.

(7) A statement signed and sealed by a professional engineer licensed to practice in Texas shall be submitted in the notification to the executive director to certify that the LRPUT is designed in a manner that will comply with the following standards.

(A) The LRPUT shall not cause a discharge of solid waste or pollutants adjacent to or into the waters of the state, including ground water, that is in violation of the requirements of the Texas Water Code, §26.121;

(B) The LRPUT shall not adversely affect human health, public safety or the environment, either during fill operations or after the reclamation project is complete; and

(C) Tire or tire pieces shall not be placed below ground in a manner that constitutes disposal as defined in Texas Health and Safety Code §361.003(7);

(8) An affidavit signed by the property owner shall be submitted certifying that:

(A) the borrow area, hole or disturbed land area existed before the project; was excavated for another purpose; and was not excavated for the burial of tire pieces;

(B) the LRPUT will be completed in a manner that will comply with all regulations set forth in this subchapter and any other rules of the commission or any other local, state or federal agency which apply; and

(C) the local fire marshal has been notified of the tire placement or fill activity.

(9) An affidavit signed by the operator shall be submitted certifying that he or she is familiar with the application and all supporting data; is aware of all commitments represented in the notification; is familiar with all pertinent requirements in these regulations; and agrees to develop and operate the project in accordance with the application, applicable local and state regulations, and any special provisions that may be imposed by the executive director.

(10) The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate groundwater district; and to the appropriate regional council of government. Proof of mailing shall be provided in the form of return receipts for registered mail. Prior to authorizing a LRPUT, the executive director shall consider any timely written notice by a local government with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements related to managing scrap tires and protecting public health and the environment. Local governments' notice of noncompliance shall include adequate documentation of noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local government's decision determines that an application complies with local requirements. Local governments shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director.

(11) Upon the filing of the notification documents, the facility owner or operator shall provide notice to the general public by means of a notice by publication and a notice by mail. Each notice shall specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the LRPUT project. The notices shall specify that the notification documents have been provided to the county judge and that they are available for review by interested parties. The applicant shall publish notice in the county in which the facility is located, and in adjacent counties. The notice shall be published once a week for three weeks. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice by certified mail, return receipt requested, shall be sent to all adjacent landowners and all owners of property within 500 feet of the boundary of the project; the health authorities of the city and county in which the project will be located, if applicable; and the appropriate state senator and representative for the area encompassing the project.

(b) Undisturbed land shall not be excavated for the purpose of filling the same land with a mixture of tires and debris or soil. Any borrow area, hole or other disturbed land area to be used for a LRPUT must have existed before the project, and it must have been excavated or soil removed for a purpose other than for the burial of tire pieces.

(c) The LRPUT shall not result in a public nuisance.

(d) An applicant for a LRPUT shall notify the local fire authority serving the area of the proposed tire placement or fill activity. If an owner or operator of a LRPUT does not intend to provide its own fire fighting personnel or system, the owner or operator shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. Prior to authorizing a LRPUT, the executive director shall consider any timely written notification by a local fire authority with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Such notice shall include adequate documentation of the noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local fire authority's decision determines that an application complies with local requirements. Local fire authority officials shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director. Applicants must provide proof that the mailed notice was received by the fire authority.

(e) All tires used to fill land shall be split, quartered, or shredded. Whole tires shall not be placed below ground.

(f) The owner and operator of the LRPUT shall comply with all applicable local ordinances, including any public safety, or zoning and land use laws.

(g) Shredded, split or quartered tires placed below ground shall be mixed in a proportion no greater than approximately 50% by volume with inert material acceptable for filling land. If greater than 50% of tire pieces by volume are placed below ground, the site is considered a tire monofill and is subject to §328.65 of this title (relating to Tire Monofill Permit Required).

(h) Tire pieces shall be placed no closer than 18 inches to the final grade or ground surface. A soil cover unadulterated with tire pieces shall make up at least the upper 18 inches of the reclamation project.

(i) The owner or operator of the LRPUT shall register as a scrap tire facility if a shredding operation is conducted on site for processing tires.

(j) The owner or operator of the LRPUT shall register as a scrap tire storage site under §328.60 of this title (relating to Scrap Tire Storage Site Registration) if:

(1) operations requiring storage of more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or more than 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers would qualify the site as a registered tire storage site under §328.60 of this title; and

(2) the construction of the LRPUT extends beyond 90 days from the date of delivery of tires or tire pieces to the site.

(k) The executive director shall issue an identifying number at the time the approval letter for the LRPUT is issued. This identifying number shall be referenced in any correspondence relating to a particular LRPUT for which such a number is issued.

(l) A person may provide the commission with written comments on any notification of a LRPUT project. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for a LRPUT.

(m) Following completion of all fill activities for the LRPOT, the owner or operator shall submit to the executive director, for review and approval, a documented certification signed by a licensed professional engineer verifying that the project has been completed in accordance with this subchapter, the notification documents, and all attachments. Once approved, this certification shall be placed in the file.

(n) The term "local government" as used in this section is defined in Texas Health and Safety Code, §361.003(17).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005400

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Effective date: October 7, 2010

Proposal publication date: April 16, 2010

For further information, please call: (512) 239-2548



30 TAC §328.67, §328.68

STATUTORY AUTHORITY

These repeals are adopted under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits: Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The adopted repeals implement THSC, §361.061 and §361.112.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005401

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Effective date: October 7, 2010

Proposal publication date: April 16, 2010

For further information, please call: (512) 239-2548



CHAPTER 330. MUNICIPAL SOLID WASTE

SUBCHAPTER U. STANDARD AIR PERMITS FOR MUNICIPAL SOLID WASTE LANDFILL FACILITIES AND TRANSFER STATIONS

30 TAC §330.983

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §330.983 *without changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 3002).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of this rulemaking is to update a cross-reference and to make non-substantive changes to update rule language to current *Texas Register* style and format requirements.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, to address issues raised by the United States Environmental Protection Agency in its April 14, 2010, edition of the *Federal Register* (75 *Federal Register* 19468) notice of disapproval of the TCEQ rules that relate to the establishment of the state's qualified facilities program as a State Implementation Plan revision.

SECTION DISCUSSION

§330.983, *Definitions*

The commission amends §330.983(8), *Definitions*, to correct a cross-reference in the definition of "Modification of existing facility" resulting from concurrently proposed amendments to Chapter 116.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The sole intent of the rulemaking is to correct a cross-reference to §116.10 and make non-substantive formatting and style changes. In a concurrent rulemaking, the commission is renumbering the paragraphs in §116.10. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule merely corrects the changed cross-reference.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this rule in accordance with Texas Government Code, §2007.043. The following is that assessment. The specific purpose of this rulemaking is to incorporate a corrected cross-reference to §116.10. The rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the rule is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and to balance benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone.

CMP policies applicable to the rules include the construction and operation of solid waste treatment, storage, and disposal facilities and discharge of municipal and industrial waste to coastal waters.

The specific purpose of this rule amendment is to update a cross-reference in the rule. Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the rule is consistent with these CMP goals and policies; the rule does not create or have a direct or significant adverse effect on any CNRAs; and will ensure proper municipal solid waste management in all regions of the state, including coastal areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 10, 2010, at the commission's central office located at 12100 Park 35 Circle, and the comment period closed on June 7, 2010. No oral or written comments were received during the comment period.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and Texas Health and Safety Code (THSC), §361.011, concerning Commission's Jurisdiction: Municipal solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; §361.024, concerning Rules and Standards, which provides the commission with rulemaking authority; §361.061, concerning Permits: Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; §363.061, concerning Commission Rules; Approval of Regional and Local Solid Waste Management Plan, which authorizes the commission to adopt rules relating to regional and local solid waste management plans; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes

of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; and §382.05195, concerning Standard Permit, which authorizes the commission to issue standard permits and to adopt rules as necessary to implement standard permits.

The amendment implements THSC, §§361.002, 361.011, 361.024, 361.061, 361.123, 361.124, 363.061, 382.002, 382.003, 382.011, 382.051, and 382.05195.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2010.

TRD-201005396

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Effective date: October 7, 2010

Proposal publication date: April 16, 2010

For further information, please call: (512) 239-6090



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3042

The Comptroller of Public Accounts adopts an amendment to §9.3042, concerning request forms for separate or joint taxation, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6633).

This section is being amended to increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administra-

tive Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3042 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §5.07(a) - (b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005324

Ashley Harden

General Counsel

Comptroller of Public Accounts

Effective date: October 3, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3045

The Comptroller of Public Accounts adopts an amendment to §9.3045, concerning application for September 1 inventory appraisal, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6635).

This section is being amended to delete references to the State Property Tax Board and increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3045 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §5.07(a) - (b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005325

Ashley Harden

General Counsel

Comptroller of Public Accounts

Effective date: October 3, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3048

The Comptroller of Public Accounts adopts an amendment to §9.3048, concerning publication of budget, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6635).

This section is amended to delete references to the State Property Tax Board and increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3048 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §5.07(a) - (b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005326

Ashley Harden

General Counsel

Comptroller of Public Accounts

Effective date: October 3, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3049

The Comptroller of Public Accounts adopts an amendment to §9.3049, concerning change of use determination, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6636).

This section is amended to delete references to the State Property Tax Board, provide language applicable to additional statutory provisions regarding change of use determinations, and increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and

resulted in a determination that the reasons for initially adopting §9.3049 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §5.07(a) - (b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 15, 2010.

TRD-201005367

Ashley Harden

General Counsel

Comptroller of Public Accounts

Effective date: October 5, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3054

The Comptroller of Public Accounts adopts an amendment to §9.3054, concerning requests to postpone tax bill, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6637).

This section is being amended to delete references to the State Property Tax Board and increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3054 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §5.07(a) - (b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 15, 2010.

TRD-201005368

Ashley Harden

General Counsel

Comptroller of Public Accounts

Effective date: October 5, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3057

The Comptroller of Public Accounts adopts the repeal of §9.3057, concerning notice of hearing on proposal to tax non-business personal property, without changes to the proposal as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6638).

The repeal is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3057 no longer exist.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Government Code, §2001.039(c), which authorizes the repeal of a rule upon agency assessment in conducting a rule review that the reasons for initially adopting the rule no longer exist.

The repeal implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 16, 2010.

TRD-201005382

Ashley Harden

General Counsel

Comptroller Public Accounts

Effective date: October 6, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



34 TAC §9.3064

The Comptroller of Public Accounts adopts an amendment to §9.3064, concerning public notice of protest and appeal forms, without changes to the proposed text as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6638).

This section is being amended to more thoroughly specify minimum standards for the form and content of the notice required pursuant to Tax Code, §41.70 and to increase administrative efficiency by providing for comptroller revision of applicable forms. The amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter H, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.3064 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §41.70.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 16, 2010.

TRD-201005383

Ashley Harden

General Counsel

Comptroller Public Accounts

Effective date: October 6, 2010

Proposal publication date: July 30, 2010

For further information, please call: (512) 475-0387



PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.4

The Texas County and District Retirement System adopts the repeal of §107.4, concerning the determination of amortization periods for annually determined contribution rate plans. The repeal is adopted without changes to the proposal as published in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6796).

The adopted repeal is in conformity with and to maintain consistency with Government Code, §844.703(f), which provides that the prior service contribution rates prescribed in subsection (b) must be based upon open or closed amortization periods adopted by the board of trustees. The board of trustees establishes such amortization periods by appropriately authorized resolutions. As such, establishing amortization periods through §107.4 is not necessary.

No comments were received regarding the adoption of this repeal.

The repeal is adopted under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system. The repeal is also based upon Government Code, §844.703(f), as outlined above.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005323

W. James Nabholz, III

General Counsel

Texas County and District Retirement System

Effective date: October 3, 2010

Proposal publication date: August 6, 2010

For further information, please call: (512) 637-3355



34 TAC §107.6

The Texas County and District Retirement System (system) adopts an amendment to §107.6, concerning the late reporting penalty assessed against participating subdivisions when they fail to timely file the required monthly report with the system. The amendment is adopted with changes to the proposed text as published in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6797).

The adopted amendment clarifies provisions relating to the waiver of penalties for late reporting, and includes additional notice requirements to each member of the county commissioners' courts or the chief employees of participating subdivisions for failure to timely file required monthly reports. It also makes clear that the added provisions to the rule do not alter obligations to enforce monthly reporting requirements.

No comments were received regarding the adoption of this amendment.

The amendment is adopted under Government Code, §845.102(a), which allows the board of trustees to adopt rules and perform reasonable activities necessary or desirable for efficient administration of the system, and under Government Code, §845.102(b), which permits the board of trustees to establish system wide standards to which all subdivisions are subject, and at a time and in a manner the board determines to be appropriate and in the best interests of the system, the members, or their beneficiaries.

The Government Code §845.407 is affected by this adoption.

§107.6. Penalty for Late Reporting; Waiver of Penalty.

(a) In this section "report" means the combination of all information and contributions required to be provided to and deposited with the system for each month of participation, in accordance with Chapter 845, Subchapter E, Government Code.

(b) A due date of a monthly report that is a Saturday, Sunday, or legal holiday is extended to the first day that is not a Saturday, Sunday, or legal holiday, but the dates provided by §845.407(c) for eligibility for an exemption from a penalty assessment are not extended if they fall on a Saturday, Sunday, or legal holiday. The penalty for a past-due report consists of an administrative fee in the amount provided by §845.407(a), Government Code, plus interest on the past-due amounts for each day past due computed at an annual rate provided by that subsection.

(c) If a report is past due, the system shall notify each member of the county commissioners' court or the chief employee of the subdivision stating the due date of the report, that the report was not received by the due date, that unless the subdivision submits proof satisfactory to the system that the report was sent in compliance with §845.407(c), Government Code, the subdivision is subject to a penalty for late reporting in accordance with §845.407(a), Government Code, and that the amount of the penalty will be computed and assessed on receipt of the report. If applicable, the notice shall also state that the subdivision

is eligible for a waiver of the late reporting penalty under subsection (g) of this section.

(d) After the system receives the past-due report, a notice shall be mailed to each member of the county commissioners' court or the chief employee of the subdivision stating that a penalty has been assessed for late reporting in accordance with §845.407, Government Code, and indicating the date the report was received by the system, the number of days the report was past due, the amount of contributions on which interest was charged, the accumulated interest and the administrative fee. The notice shall inform each member of the county commissioners' court or the chief employee that if the penalty is not paid within the period provided by §845.407(a), Government Code, the penalty shall be deducted from the subdivision's account in the Subdivision Accumulation Fund and credited to other funds of the system in accordance with that subsection.

(e) The amount of the penalty stated in the notice described by subsection (d) of this section becomes fixed and final on the tenth business day following the date of the notice and may not be modified thereafter for any reason.

(f) For purposes of §845.407, Government Code, approved same-day or overnight delivery services are:

- (1) Federal Express;
- (2) United Parcel Service;
- (3) Lone Star Overnight;
- (4) United States Postal Service; and

(5) any other delivery service that provides same-day or overnight delivery accompanied by written proof of the date of mailing by the subdivision.

(g) In the event a participating subdivision fails to timely file its required monthly report with the system, and either before or after receipt of the late notice advice from the system, the subdivision files the report within five business days of its original due date, the system will waive the late reporting penalty imposed by §845.407, Government Code, if the subdivision has not received a waiver in the preceding twenty-four month period. In no event shall any participating subdivision receive more than one waiver of the late reporting penalty in any twenty-four month reporting period.

(h) In the event a subdivision receives a waiver of the late reporting penalty as provided in subsection (g) of this section, the system shall notify each member of the county commissioners' court or the chief employee of the subdivision that the subdivision received the waiver and that it will not be eligible for another waiver of the late reporting penalty in the following twenty-four month period.

(i) For purposes of computing the "preceding" and "following" twenty-four month periods described by subsections (g) and (h) of this section, the periods shall be calculated using the due dates of the monthly reports as described in Chapter 845, Subchapter E, Government Code. The "preceding" twenty-four month period described in subsection (g) of this section begins with the month a report was due as the first month and counts back twenty-four months. The "following" twenty-four month period described in subsection (h) of this section begins with the month a waiver was granted as the first month and counts forward twenty-four months.

(j) The waiver provision provided in subsection (g) of this section in no way alters any obligation or procedure of the system to enforce the monthly reporting and penalty requirements of Chapter 845, Subchapter E, Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 2010.

TRD-201005321

W. James Nabholz, III

General Counsel

Texas County and District Retirement System

Effective date: October 3, 2010

Proposal publication date: August 6, 2010

For further information, please call: (512) 637-3355

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas State Soil and Water Conservation Board

Title 31, Part 17

The Texas State Soil and Water Conservation Board files this notice of intent to review Title 31, Part 17, Chapter 518, Subchapter A, §518.1 and §518.2, Employee Training Rules, of the Texas Administrative Code (TAC) in accordance with the Texas Government Code, §2001.039. The Agency finds that the reason for adopting the rule continues to exist.

As required by §2001.039 of the Texas Government Code, the Agency will accept comments and make a final assessment regarding whether the reason for adopting the rule continues to exist. The comment period will last 30 days beginning with the publication of this notice of intent to review.

Comments or questions regarding this rule review may be submitted to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, by e-mail to risom@tss-wcb.state.tx.us, or by facsimile at (254) 773-3311.

TRD-201005438

Mel Davis

Special Projects Coordinator

Texas State Soil and Water Conservation Board

Filed: September 20, 2010



The Texas State Soil and Water Conservation Board files this notice of intent to review Title 31, Part 17, Chapter 523, §§523.1 - 523.8, Agricultural and Silvicultural Water Quality Management, of the Texas Administrative Code (TAC) in accordance with the Texas Government Code, §2001.039. The Agency finds that the reason for adopting the rule continues to exist.

As required by §2001.039 of the Texas Government Code, the Agency will accept comments and make a final assessment regarding whether the reason for adopting the rule continues to exist. The comment period will last 30 days beginning with the publication of this notice of intent to review.

Comments or questions regarding this rule review may be submitted to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, by e-mail to risom@tss-wcb.state.tx.us, or by facsimile at (254) 773-3311.

TRD-201005439

Mel Davis

Special Projects Coordinator

Texas State Soil and Water Conservation Board

Filed: September 20, 2010



The Texas State Soil and Water Conservation Board files this notice of intent to review Title 31, Part 17, Chapter 525, Subchapter A, §§525.1 - 525.9, Technical Assistance Program for Soil and Water Conservation Land Improvement Measures, of the Texas Administrative Code (TAC) in accordance with the Texas Government Code, §2001.039. The Agency finds that the reason for adopting the rule continues to exist.

As required by §2001.039 of the Texas Government Code, the Agency will accept comments and make a final assessment regarding whether the reason for adopting the rule continues to exist. The comment period will last 30 days beginning with the publication of this notice of intent to review.

Comments or questions regarding this rule review may be submitted to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, by e-mail to risom@tss-wcb.state.tx.us, or by facsimile at (254) 773-3311.

TRD-201005440

Mel Davis

Special Projects Coordinator

Texas State Soil and Water Conservation Board

Filed: September 20, 2010



TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 19 TAC §153.1022(d)

<u>Years of Experience Credited</u>	<u>Monthly Salary [Amount]</u>	<u>Annual Salary (10-month contract)</u>
0	2,732	<u>27,320</u>
1	2,791	<u>27,910</u>
2	2,849	<u>28,490</u>
3	2,908	<u>29,080</u>
4	3,032	<u>30,320</u>
5	3,156	<u>31,560</u>
6	3,280	<u>32,800</u>
7	3,395	<u>33,950</u>
8	3,504	<u>35,040</u>
9	3,607	<u>36,070</u>
10	3,704	<u>37,040</u>
11	3,796	<u>37,960</u>
12	3,884	<u>38,840</u>
13	3,965	<u>39,650</u>
14	4,043	<u>40,430</u>
15	4,116	<u>41,160</u>
16	4,186	<u>41,860</u>
17	4,251	<u>42,510</u>
18	4,313	<u>43,130</u>
19	4,372	<u>43,720</u>
20 & Over	4,427	<u>44,270</u>

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Notice of Settlement of a Texas Water Code and Texas Health and Safety Code Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water and Health and Safety Codes. Before the State may settle a judicial enforcement action, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of ch. 7 of the Texas Water Code.

Case Title and Court: *State of Texas v. Gerardo J. Longoria, Individually; Quality Caliche Pit, Inc.; Corner Pit, Inc.; and the Lone Star Mining, Ltd.*, Cause No. D-1-GV-06-001098 in the 200th District, Travis County, Texas.

Background: This is a suit for enforcement of rules of the Texas Commission on Environmental Quality for violations at an unauthorized solid waste disposal facility in Hidalgo County, Texas

Nature of Settlement: The proposed Agreed Final Judgment against the Lone Star Mining, Ltd., settles all of the State's claims in the suit against Lone Star Mining, Ltd.

Proposed Settlement: The Agreed Final Judgment contains provisions for civil penalties, and attorney's fees. The judgment awards the State attorney's fees of \$3,000.00; and civil penalties of \$7,000.00.

The Office of the Attorney General will accept written comments relating to this proposed judgment for thirty (30) days from the date of the publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment and written comments on the proposed judgment should be directed to Sarah Jane Utley, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201005462

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 21, 2010



Notice of Settlement of a Texas Water Code and Texas Health and Safety Code Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water and Health and Safety Codes. Before the State may settle a judi-

cial enforcement action, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of ch. 7 of the Texas Water Code.

Case Title and Court: *State of Texas v. GBAK Properties, Inc. d/b/a Exxon Eldridge and Sunrise Convenience Store*, Cause No. D-1-GV-06-001856 in the 345th District, Travis County, Texas.

Background: This is a suit for enforcement of rules of the Texas Commission on Environmental Quality ("TCEQ") and a TCEQ order concerning a convenience store with retail sales of gasoline in Houston, Texas.

Nature of Settlement: The proposed Agreed Final Judgment settles all of the State's claims in the suit.

Proposed Settlement: The Agreed Final Judgment contains provisions for civil penalties, and attorney's fees. The judgment awards the State attorney's fees of \$8,000.00; and civil penalties of \$25,000.00.

The Office of the Attorney General will accept written comments relating to this proposed judgment for thirty (30) days from the date of the publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment and written comments on the proposed judgment should be directed to Sarah Jane Utley, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201005463

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 21, 2010



Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of September 10, 2010, through September 16, 2010. As required by federal law, the public is given

an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on September 22, 2010. The public comment period for this project will close at 5:00 p.m. on October 22, 2010.

FEDERAL AGENCY ACTIONS:

Applicant: Dolphin Point Home Owners Association; Location: The project site is located in the Gulf Intracoastal Waterway (GIWW) at 12th Street and Commerce Street in Port O'Connor, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Port O'Connor, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 753095; Northing: 3148671. Project Description: The applicant proposes to amend the Department of Army (DA) Permit No. SWG-1991-01714 [formerly DA Permit No. 12253(05)] to include placement of fill in the form of sand and concrete matting along the bulkhead in order to reinforce the bank stabilization repair behind the bulkhead. On top of the sand, the applicant proposes to install a concrete articulating mat to a depth of 10.00 feet below mean sea level (MSL) at the bulkhead and slope down to a 12.00 feet below MSL or to existing grade. Horizontally, the mat would not extend any further than 12 feet channelward from the bulkhead. CMP Project No.: 10-0165-F1. Type of Application: U.S.A.C.E. permit application #SWG-1991-01714 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications for inspection, may be obtained from Ms. Kate Zultner, Consistency Review Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.state.tx.us. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201005466

Larry L. Laine

Chief Clerk/Deputy Land Commissioner, General Land Office

Coastal Coordination Council

Filed: September 21, 2010

◆ ◆ ◆ Comptroller of Public Accounts

Local Sales Tax Rate Changes Effective October 1, 2010

The 1 percent local sales and use tax will become effective October 1, 2010 in the cities listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Kurten (Brazos Co)	2021041	.010000	.077500
Pleasant Valley (Wichita Co)	2243052	.010000	.072500

The 1/4 percent city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will be abolished, effective September 30, 2010, in the cities listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Crystal City (Zavala Co)	2254012	.017500	.080000
Lone Oak (Hunt Co)	2116083	.010000	.077500

An additional 1/4 percent city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2010 in the cities listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Amherst (Lamb Co)	2140010	.012500	.075000
Naples (Morris Co)	2172020	.012500	.080000
Nolanville (Bell Co)	2014095	.015000	.082500
Thrall (Williamson Co)	2246068	.012500	.075000
Trinidad (Henderson Co)	2107039	.017500	.080000

An additional 1/2 percent city sales and use tax for property tax relief will become effective October 1, 2010 in the city listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Village of the Hills (Travis Co)	2227187	.007500	.082500

An additional 1/4 percent city sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations (4B) will become effective October 1, 2010 in the city listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Levelland (Hockley Co)	2110016	.020000	.082500

An additional 1/2 percent city sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations (4B) will become effective October 1, 2010 in the cities listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Coahoma (Howard Co)	2114021	.015000	.077500
Old River Winfree (Chambers Co)	2036044	.015000	.082500
Old River Winfree (Liberty Co)	2036044	.015000	.082500
Wolfe City (Hunt Co)	2116038	.015000	.082500

An additional 1 percent city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/2 percent as permitted under Chapter 504 of the Texas Local

Government Code, Type A Corporations **(4A)** plus an additional 1/2 percent as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations **(4B)** will become effective October 1, 2010 in the city listed below.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Tom Bean (Grayson Co)	2091108	.020000	.082500

The additional 1/4 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporations **(4A)** will be **abolished** effective September 30, 2010 and the adoption of an additional 1/4 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations **(4B)** will become effective October 1, 2010 in the city listed below. There will be no change in the local rate or total rate.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Bellmead (McLennan Co)	2161050	.015000	.082500

The additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporations **(4A)** will be **abolished** effective September 30, 2010 and the adoption of an additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations **(4B)** will become effective October 1, 2010 in the cities listed below. There will be no change in the local rate or total rate.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Meadows Place (Fort Bend Co)	2079168	.020000	.082500
Palacios (Matagorda Co)	2158019	.020000	.082500

The additional 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will be **abolished** effective September 30, 2010 and the additional 1/4 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporations **(4A)** will be increased to 1/2 percent effective October 1, 2010 in the city listed below. There will be no change in the local rate or total rate.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Jasper (Jasper Co)	2121022	.020000	.082500

The additional 1/2 percent city sales and use tax improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporations **(4A)** will be **reduced** to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2010 in the city listed below. There will be no change in the local rate or total rate.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Aspermont (Stonewall Co)	2217018	.020000	.082500

The additional 1/2 percent sales and use tax for property tax relief will be **abolished** and the adoption of an additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations

(4B) will become effective October 1, 2010 in the city listed below. There will be no change in the local rate or total rate.

<u>CITY NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>	<u>TOTAL RATE</u>
Coleman (Coleman Co)	2042028	.020000	.082500

The 1/2 percent special purpose district sales and use tax will be **abolished** effective October 1, 2010 in the Special Purpose Districts listed below.

<u>SPD NAME</u>	<u>LOCAL CODE</u>	<u>LOCAL RATE</u>
Rockdale Hospital District	5166509	.000000
Rockdale Municipal Development District	5166518	.000000

A 1/4 percent special purpose district sales and use tax will become effective October 1, 2010 in the special purpose districts listed below.

<u>SPD NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Bartonville Crime Control District	5061603	.002500	SEE NOTE 1
Evant Municipal Development District	5097503	.002500	SEE NOTE 2
Kemp Municipal Development District	5129514	.002500	SEE NOTE 3

A 1/2 percent special purpose district sales and use tax will become effective October 1, 2009 in the special purpose districts listed below.

<u>SPD NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Rockdale Municipal Development District	5166527	.005000	SEE NOTE 4
San Jacinto County Emergency Services District	5204503	.005000	SEE NOTE 5

A 1 3/4 percent special purpose district sales and use tax will become effective October 1, 2010 in the special purpose district listed below.

<u>SPD NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Travis County Emergency Services District No. 6-A	5227622	.017500	SEE NOTE 6

A 2 percent special purpose district sales and use tax will become effective October 1, 2010 in the special purpose district listed below.

<u>SPD NAME</u>	<u>LOCAL CODE</u>	<u>NEW RATE</u>	<u>TOTAL RATE</u>
Hardin County Emergency Services District No. 2	5100508	.020000	SEE NOTE 7

NOTE 1: The boundaries of the Bartonville Crime Control District are the same as the boundaries for the city of Bartonville. Contact the district representative at (817) 430-4052 for additional boundary information.

NOTE 2: The Evant Municipal Development District is located in Coryell and Hamilton counties, each of which imposes a county sales and use tax. The development district has the same boundaries

as the Evant extraterritorial jurisdiction, which includes the city of Evant. The district is partially located in ZIP code 76525. Contact the district representative at (254) 471-3135 for additional boundary information.

NOTE 3: The Kemp Municipal Development District is located in Kaufman County. The development district has the same boundaries as the Kemp extra-territorial jurisdiction, which includes the city of Kemp. The district is partially located in ZIP code 75143. Contact the district representative at (903) 498-3191 for additional boundary information.

NOTE 4: The Rockdale Municipal Development District is located in the south central portion of Milam County, which has a county sales and use tax. The district has the same boundaries as the Rockdale extra-territorial jurisdiction which includes the city of Rockdale. The district is partially located in ZIP code 76567. Contact the district representative at (512) 446-2511 for additional boundary information.

NOTE 5: The San Jacinto County Emergency Services District has the same boundaries as San Jacinto County, which has a county sales and use tax. The district excludes any area within the cities of Coldspring and Shepherd, and the Waterwood Municipal Utility District No. 1 located in the northern portion of San Jacinto County. Contact the district representative at (713) 984-8222 for additional boundary information.

NOTE 6: The Travis County Emergency Services District 6-A is the unincorporated area of the Travis County Emergency Services District No. 6. It is located in the southwestern portion of Travis County, west of Mansfield Dam. The portion of the district west of Mansfield Dam is overlapped by the Lake Travis Community Library District, which has a special purpose district sales and use tax, except in an area surrounding the city of Bee Cave. The district's boundaries, for the imposition of sales and use tax exclude any area in the cities of Bee Cave, Lakeway or Village of the Hills. The unincorporated areas of Travis County in ZIP Codes 78620, 78669, 78730, 78734 and 78738 are partially located within the Travis County Emergency Services District No. 6-A. Contact the district representative at (512) 266-2533 for additional boundary information.

NOTE 7: The Hardin County Emergency Services District No. 2 is located in the southeast portion of Hardin County and excludes the city of Lumberton. The unincorporated area of Hardin County in ZIP Codes 77625 and 77657 are partially located within Hardin County Emergency Services District No. 2. Contact the district representative at (409) 654-6730 for additional boundary information.

TRD-201005387
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: September 17, 2010



Notice of Availability of Grant Funds and Request for Applications

The Comptroller of Public Accounts (Comptroller) and the State Energy Conservation Office (SECO) establishes the Eureka! grant program to provide grants to small Texas businesses that have commercially viable innovative market-ready energy efficiency or renewable

energy products and technologies. The Eureka! program is an education and outreach component of the Texas State Energy Plan administered by SECO and is funded through the American Recovery and Reinvestment Act of 2009. By this Notice of Grant Funds Availability (Notice), SECO invites small, for-profit Texas businesses to submit applications for grants of up to \$50,000 to be used to promote innovative, commercially viable and market-ready energy efficiency or renewable energy products and technologies.

Authority: This Notice is issued pursuant to the American Recovery and Reinvestment Act of 2009, Public Law, PL-111-5 (ARRA or Act); 42 United States Code §§6321, et seq, 10 Code of Federal Regulations (CFR) Parts 420 and 600; Chapters 403, 447 and 2305, Texas Government Code; and related legal authority and regulations. The Comptrol-

ler reserves the right to restrict one grant per eligible applicant under the terms of this Notice.

Eligibility: Applicants eligible to receive a grant under this Notice will be a small business registered to conduct business in Texas and legally formed for the purpose of making a profit. The applicant must be independently owned and operated and have fewer than 100 employees or annual gross receipts of less than \$6 million. An applicant must be registered to conduct business in Texas, have a valid Texas tax identification number, and be in good standing with the state. The product or technology must have an energy-efficient or renewable energy component to be eligible and must be commercially available. Funds may not be used for research or development.

Evaluation Process: Prior to the receipt of applications, the Comptroller shall establish an Evaluation Committee. The Evaluation Committee shall include employees of the Comptroller and may include other impartial individuals who are non-Comptroller employees. All eligible applications will be reviewed for responsiveness, compliance and thoroughness. Copies of those applications found to be responsive and to be in compliance will be provided to the members of the Evaluation Committee for their independent review and evaluation according to the criteria identified in this Notice. At the discretion of the Committee and prior to the submission of the recommendation to the Comptroller, the Committee may independently verify the product or technology, may use a third party consultant to independently verify the product, or may require an applicant to make a formal presentation to the Committee. The Comptroller will make the final selection or award, if any.

Selection Criteria: Only those applications that meet minimum qualifications and meet eligibility requirements shall be evaluated and scored. The applications will be evaluated according to the following criteria and according to the designated weights:

Criterion 1: Product/Technology Innovation (30%)

- * Quality of innovation for the product or technology, with an emphasis on energy efficiency or renewable energy
- * Commercial viability, including, but not limited to, filling a need in the marketplace and market competitiveness
- * Ownership of the product or technology and patents relative to the product or technology

Criterion 2: Product/Technology Attributes (30%)

- * Contributes to the cost-competitiveness of energy efficiency or renewable energy in Texas
- * Reduces the use of fossil-fuel energy in Texas
- * Reduces the state's reliance on imported energy
- * Improves the reliability of electrical power delivery
- * Is manufactured with renewable energy (if applicable)
- * Produces environmental benefits in Texas, either from production or direct use
- * Is completely or substantially manufactured in Texas
- * Makes substantial use of Texas materials
- * Encourages Texas hiring and local economic development
- * Reduces or limits consumer costs
- * Has a long product life expectancy
- * Is easy to install and service
- * Other anticipated benefits to consumers and the state, including estimated energy savings relating to the above attributes

Criterion 3: Marketing Project, Budget and Success Quantification (40%)

- * Details of the proposed marketing project
- * Specific project goals and target audience(s)
- * Role of the proposed project in overall marketing plans
- * Business authorization for the project
- * Project budget
- * Project activities
- * Line item costs
- * Timelines related to the project
- * Proposed measurement of project success
- * Expected project impacts, including monetary, non-monetary, short-term and long-term results

Issuing Office and Contact: Parties interested in submitting an application or with questions should contact Korry Ingleman, Public Outreach and Strategies, Comptroller of Public Accounts, at: 111 E. 17th St., Austin, Texas 78774, (512) 463-3806. The foregoing is the Issuing Office and address for purposes of this Notice. A copy of the application, instructions, and grant agreement will be made available at <http://www.seco.cpa.state.tx.us/arra> or through the Comptroller's stimulus web site at <http://www.secostimulus.org> October 1, 2010, after 10:00 a.m. Central Standard Time (CST).

Closing Date: Applications must be delivered in the Issuing Office to the attention of Ms. Ingleman no later than 2:00 p.m. (CST), on Friday, November 5, 2010. Late applications will not be considered under any circumstances. Applicants shall be solely responsible for verifying the timely receipt of Applications in the Issuing Office. The Comptroller anticipates that grant awards, if any, may be made as soon thereafter as practical.

TRD-201005484

William Clay Harris

Assistant General Counsel, Contracts

Comptroller of Public Accounts

Filed: September 22, 2010



Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/27/10 - 10/03/10 is 18% for Consumer¹/Agricultural/Commercial²/credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/27/10 - 10/03/10 is 18% for Commercial over \$250,000.

The judgment ceiling as prescribed by §304.003 for the period of 10/01/10 - 10/31/10 is 5.00% for Consumer/Agricultural/Commercial/credit through \$250,000.

The judgment ceiling as prescribed by §304.003 for the period of 10/01/10 - 10/31/10 is 5.00% for Commercial over \$250,000.

¹Credit for personal, family or household use.

²Credit for business, commercial, investment or other similar purpose.

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Texas Commission on Environmental Quality

Notice of Proposed Amendment and Renewal of a General Permit Authorizing the Discharge of Wastewater

The Texas Commission on Environmental Quality (TCEQ) proposes to amend and renew a general permit, Texas Pollutant Discharge Elimination System Permit No. TXG130000, authorizing the discharge of wastes from concentrated aquatic animal production facilities, aquatic animal production facilities, and certain related activities into or adjacent to water in the state. The proposed general permit applies to the entire state of Texas. General permits are authorized by §26.040 of the Texas Water Code.

PROPOSED GENERAL PERMIT. The executive director has prepared a draft renewal with amendments of an existing general permit that authorizes the discharge of wastes from concentrated aquatic animal production facilities, aquatic animal production facilities, and certain related activities. No significant degradation of high quality waters is expected and existing uses will be maintained and protected. The executive director proposes to require regulated dischargers to submit a Notice of Intent (NOI) to obtain authorization for some discharges.

The executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council (CCC) regulations, and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the proposed general permit and fact sheet are available for viewing and copying at the TCEQ Office of the Chief Clerk located at the TCEQ's Austin office, at 12100 Park 35 Circle, Building F. These documents are also available at the TCEQ's sixteen (16) regional offices and on the TCEQ website at http://www.tceq.state.tx.us/permitting/water_quality/wastewater/general/index.html.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting about this proposed general permit. The purpose of a public meeting is to provide the opportunity to submit written or oral comment or to ask questions about the proposed general permit. Generally, the TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the proposed general permit or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, PO Box 13087, Austin, TX 78711-3087 within 30 days from the date this notice is published in the *Texas Register*.

APPROVAL PROCESS. After the comment period, the executive director will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least 10 days before the scheduled Commission meeting when the commission will consider approval of the general permit. The commission will consider all public comment in making its decision and will either adopt the executive director's response or prepare its own response. The commission will issue its written response on the general permit at the same time the commission issues or denies the general permit. A copy of any issued general permit and response to comments will be made available to the public for inspection at the agency's

Austin and regional offices. A notice of the commissioners' action on the proposed general permit and a copy of its response to comments will be mailed to each person who made a comment. Also, a notice of the commission's action on the proposed general permit and the text of its response to comments will be published in the *Texas Register*.

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific general permit; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify the mailing lists to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address above. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this general permit or the permitting process, please call the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at: <http://www.tceq.state.tx.us>.

Further information may also be obtained by calling the TCEQ's Water Quality Division, Industrial Permits Team, at (512) 239-4671.

Si desea información en Español, puede llamar 1-800-687-4040.

TRD-201005483
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 22, 2010

◆ ◆ ◆
Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Major Amendment

Permit Number 1225D

APPLICATION. Cowtown Processing and Disposal Inc., DBA Cold Springs Processing and Disposal, P.O. Box 1823, Fort Worth, Tarrant County, Texas 76101, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major permit amendment to request an increase in the permitted monthly quantity of waste accepted and processed at the facility. The facility is located at 1300 Cold Springs Road, Building 2, Fort Worth, Tarrant County, Texas 76102. The TCEQ received the application on July 23, 2010. The permit application is available for viewing and copying at the Tarrant County Courthouse, 100 E. Weatherford Street, Fort Worth, Tarrant County, Texas 76196 and also at the website: www.coldspringsprocessing.com.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Cowtown Processing and Disposal Inc., DBA Cold Springs Processing and Disposal at the address stated above or by calling Mr. Gil Barnett, CP&Y, Inc. at (817) 354-0189.

Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Amendment

Permit No. 2240a

APPLICATION. Waste Corporation of Texas, L.P., c/o Ralston Road Landfill, 6632 John Ralston Road, Houston, Harris County, Texas 77049, has applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to their current Type IV municipal solid waste permit. The applicant is requesting a major amendment to the permit to increase the current maximum fill elevation from 85 feet above mean sea level (ft-msl) to 136.75ft-msl, and proposing to add +5 acres to the permitted boundary of the facility, for a total permitted area of +55 acres. The facility is located approximately 760 feet south of the intersection of John Ralston Road and U.S. Highway 90, Houston, Harris County, Texas 77049. The TCEQ received the application on August 13, 2010. The permit application is available for viewing and copying at the Houston Public Library System, Lakewood Neighborhood Branch, 8815 Feland Street, Houston, Harris County, Texas 77028.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive

Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Waste Corporation of Texas, L.P. at the address stated above or by calling Mr. Stephen H. Seed, Vice President at (713) 292-2400.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201005482

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: September 22, 2010



Notice of Water Quality Applications

The following notice was issued on September 10, 2010 through September 17, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 70 has applied for a major amendment to TPDES Permit No. WQ0010530001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 225,000 gallons per day to a daily average flow not to exceed 275,000 gallons per day. The facility is located approximately one mile west of the intersection of Foley Road and Hannah Nash Road, approximately three miles north of the City of Crosby in Harris County, Texas 77532.

CITY OF LAREDO has applied for a renewal of TPDES Permit No. WQ0010681001 which authorizes the discharge of treated filter backwash effluent from a water treatment plant at an annual average flow not to exceed 4,100,000 gallons per day. The facility is located at 2519 Jefferson Street, adjacent to the Rio Grande in the City of Laredo in Webb County, Texas 78040.

CITY OF MOUNT VERNON has applied for a renewal of TPDES Permit No. WQ001122002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 425,000 gallons per day. The facility is located approximately 1,500 feet east of State Highway 37 and 1,500 feet north of U.S. Highway 67 in Franklin County, Texas 75457.

CIBOLO CREEK MUNICIPAL AUTHORITY has applied for a major amendment to TPDES Permit No. WQ0011269001 to relocate the discharge point from Outfall 001 to Outfall 002, and to change the disinfection method from chlorination to an ultraviolet light system. The draft permit authorizes the land application of sewage sludge for beneficial use on 165.3 acres. The facility is located at 12423 Authority Lane, Cibolo, approximately 2.25 miles northeast of the center of Randolph Air Force Base on the south bank of Cibolo Creek in Bexar County, Texas 78108.

FRM/MRA HOLDINGS 1 LTD has applied for a renewal of TPDES Permit No. WQ0014703001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 980,000 gallons per day. The facility will be located approximately 5,000 feet north of the intersection of North Lake Houston Parkway and East Beltway 8 North, and approximately 2,200 feet east of East Beltway 8 North in Harris County, Texas 77044.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201005481

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: September 22, 2010



Public Hearing on Proposed Revisions to 30 TAC Chapter 334

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed amendments to 30 Texas Administrative Code (TAC) Chapter 334, Underground and Aboveground Storage Tanks, §§334.42, 334.45, 334.49, and 334.50; and the addition of a proposed new Subchapter N, Operator Training, §§334.601 - 334.606.

The proposed new Subchapter N would incorporate Underground Storage Tank (UST) facility operator training requirements for on-site operation and maintenance of UST systems as established in federal law. The proposed amendments apply to Subchapter C of existing rules and would amend various existing technical UST requirements to: provide a more specific description of which existing and new sumps and manways need to be inspected, monitored, or tested and kept free of liquid or debris; increase the amount of time allowed for the removal of liquid and debris from sumps and manways from 72 to 96 hours; increase the amount of existing underground line which can be replaced without having to secondarily contain it from 20% to 35%; limit the maximum amount of existing underground line which must be secondarily contained during replacement; clearly specify that submerged metal com-

ponents such as submersible pump housings which are in contact with water must be protected from corrosion by means other than just coating or wrapping them; and eliminate the requirement for large airports which use extensive fuel hydrant systems to comply with automatic line leak detection requirements because there are no practical methodologies available which will provide this function.

The commission will hold a public hearing on this proposal in Austin on October 26, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services, at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2010-017-334-CE. The comment period closes November 1, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adapt.html. For further information, please contact Anton Rozsypal, Remediation Division at (512) 239-5755, Cullen Mc-Morrow, Litigation Division at (512) 239-0607 or Maria Lebron, Remediation Division at (512) 239-1898.

TRD-201005390
Kathleen Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 17, 2010

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: 8-Day Pre-Election Report due February 22, 2010 for Candidates and Officeholders

Teresa J. Hawthorne, P.O. Box 670844, Dallas, Texas 75367-0844

Deadline: Semiannual Report due July 15, 2010 for Candidates and Officeholders

Bruce Priddy, 600 Commerce, Dallas, Texas 75201

Deadline: Lobby Activities Report due June 10, 2010

Lucinda Dean Saxon, 2204 Hayfield Square, Pflugerville, Texas 78660

Deadline: Lobby Activities Report due July 12, 2010

Cynthia Brown, 3930 Glade Rd. #108-105, Colleyville, Texas 76034

Deadline: Personal Financial Statement due February 16, 2010

Teresa J. Hawthorne, P.O. Box 670844, Dallas, Texas 75367

Deadline: Personal Financial Statement due April 30, 2010

Robert Elliott Jones, 4626 Jarvis St., Corpus Christi, Texas 78412-2337

Tom C. Mesa, Jr., P.O. Box 5232, Pasadena, Texas 77508-5232

Scott C. Sanders, 11 Sentinel Hill, Austin, Texas 78737-9311

Deadline: Personal Financial Statement due June 29, 2010

C. Kent Conine, 5220 Spring Valley Rd., Ste. 204, Dallas, Texas 75254

Linda Diane Steinbrueck, 1401 Darden Hill Rd., Driftwood, Texas 78619

Deborah A. Zuloaga, 204C Vic Clark, El Paso, Texas 79912

TRD-201005386
David Reisman
Executive Director
Texas Ethics Commission
Filed: September 16, 2010

Texas Facilities Commission

Request for Proposal #303-1-20253

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-1-20253. TFC seeks a five (5) or ten (10) year lease of approximately 10,753 square feet of office space in Austin, Texas.

The deadline for questions is October 15, 2010, and the deadline for proposals is October 29, 2010, at 3:00 p.m. The target award date is November 19, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. Any addendum to the original RFP will be posted to the Electronic State Business Daily (ESBD). A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=91178.

TRD-201005478
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 22, 2010

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Transmittal Number 10-052, Amendment Number 945 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment updates the service description of targeted case management provided to infants and toddlers with developmental delays to ensure compliance with the Code of Federal Regulations, Title 42, §440.169 and §441.18. The proposed amendment is expected

to have no fiscal impact on the state or federal budgets. The proposed amendment was effective September 1, 2010.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox by mail at HHSC, P.O. Box 13247, Mail Code H600, Austin, Texas 78711; by telephone at (512) 491-1165; by facsimile at (512) 491-1953; or by e-mail at ashley.fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005381

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 15, 2010



Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services a waiver amendment for the State of Texas Access Reform PLUS (STAR+PLUS) program, which is a Managed Care waiver program under the authority of §1915(b) of the Social Security Act. The STAR+PLUS waiver amendment has been submitted to CMS and HHSC expects CMS will approve the amendment beginning January 1, 2011, and ending August 31, 2012. This amendment will be submitted following the approved amendment by CMS.

The program is designed for Texans who are elderly or who have a physical and qualify for Medicaid due to low income or Supplement Security Income eligibility. The purpose of the waiver is to integrate delivery of acute and long-term care services through a managed care system. Inpatient psychiatric services are provided in chemical dependency treatment facilities, in addition to free standing psychiatric facilities, as substitutes for inpatient acute care services. The Managed Care Organizations provide these services in residential settings in lieu of acute care inpatient hospital settings when such services are cost-effective and a medically appropriate response to the needs of the member.

The program serves approximately 165,244 aged and disabled Medicaid recipients in Atascosa, Bexar, Comal, Guadalupe, Kendall, Medina, and Wilson Counties (Bexar Service Area); Brazoria, Fort Bend, Galveston, Harris, Montgomery, and Waller counties (Harris/Harris Expansion Service Area); Aransas, Bee, Calhoun, Jim Wells, Kleberg, Nueces, Refugio, San Patricio, and Victoria counties (Nueces Service Area); and Bastrop, Burnet, Caldwell, Hays, Lee, Travis and Williamson counties (Travis Service Area).

This amendment will expand the program services to the following counties: Collin, Dallas, Ellis, Hunt, Kaufman, Navarro, Rockwall, Denton, Hood, Johnson, Parker, Tarrant and Wise.

HHSC is requesting that the waiver amendment be approved for the period beginning February 1, 2011, and ending August 31, 2012. This waiver amendment is expected to result in cost savings for the State for each year in the two-year period covering 2011 through 2012.

To obtain copies of the proposed waiver application, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-620, Austin, Texas 78708-5200, telephone (512) 491-1152, fax (512) 491-1953, or by e-mail at Christine.Longoria@hhsc.state.tx.us.

TRD-201005428

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 20, 2010



Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit to the Centers for Medicare and Medicaid Services a new Medicaid waiver under the authority of §1915(b) of the Social Security Act for the Nonemergency Medical Transportation (NEMT) Program. The proposed waiver effective date is April 1, 2011.

The principle objective of NEMT is to allow HHSC greater flexibility in arranging for cost-effective transportation services while fulfilling the federal requirement at 42 C.F.R. §431.53 that the State ensure necessary transportation for recipients to and from providers.

The current state-managed NEMT service delivery model objectives are to: (1) encourage preventive and primary care by ensuring that every client for whom Medicaid is the primary payor has access to necessary medical care and services; (2) arrange for quality and appropriate transportation to necessary medical care and services; (3) maintain access to necessary healthcare and services; (4) maintain cost effectiveness of transportation services; and (5) foster the U.S. Department of Health and Human Services' goal of promoting coordinated human services transportation.

The current model affords the transportation service area providers flexibility to ensure that client transportation needs are met by providing services directly, subcontracting transportation services, and using alternative transportation service providers to fill in gaps in the service delivery. The continuation of this model supports the use of the direct service delivery providers and the existing network of transportation providers to meet the client transportation needs. This waiver will not change the NEMT scope or benefit afforded to clients authorized through HHSC's state-managed model. HHSC retains sole authority to approve client services and benefits.

Many areas of the State are rural and have limited access to service providers and transportation services. Because Texas is a large, diverse state, HHSC is open to engaging a variety of service delivery models to ensure that clients receive quality service (including direct delivery of services in areas where the number of qualified providers is low). The current service delivery model is a client-orientated and administratively efficient model and fosters collaboration among governmental, not-for-profit and for-profit transportation providers.

Maintaining the current service model allows HHSC to operate a successfully proven delivery model, which meets the vastly differing needs of clients and supports coordination efforts at the local level and provides a cost savings to the State.

NEMT will be available to eligible individuals who must reside in the following counties: Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Atascosa, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Caldwell, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Delta, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes,

Guadalupe, Hale, Hall, Hamilton, Hansford, Hardeman, Harrison, Hartley, Haskell, Hays, Hemphill, Henderson, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jim Hogg, Jim Wells, Jones, Karnes, Kendall, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Maverick, McCulloch, McLennan, McMullen, Medina, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Newton, Nolan, Nueces, Ochiltree, Oldham, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Travis, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Ward, Washington, Webb, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wilson, Winkler, Wood, Yoakum, Young, Zapata, and Zavala.

HHSC is requesting that the new waiver be approved for the period beginning April 1, 2011, and ending March 31, 2013. This waiver renewal is expected to result in cost savings for the state for each year in the two-year period covering 2011 through 2013.

To obtain copies of the proposed waiver application, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-370, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail at Christine.Longoria@hhsc.state.tx.us.

TRD-201005431
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 20, 2010



Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Amendment 26 to the Texas State Plan for the Children's Health Insurance Program (CHIP), under Title XXI of the Social Security Act. The proposed effective date of this amendment is March 1, 2011.

The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA, Public Law 111-3), which was signed into federal law on February 4, 2009, applies the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) to state CHIP programs. The law requires states to establish parity between all covered behavioral health benefits (mental health and substance use disorder benefits) and medical and surgical benefits. In order to comply with this law, HHSC proposes to amend the CHIP State Plan to remove the existing treatment limitations for CHIP behavioral health benefits, such as limitations on the number of visits or days of treatment.

In order to offset the costs for eliminating the existing treatment limitations on CHIP behavioral health benefits, HHSC proposes to increase certain CHIP co-payment amounts. Specifically, HHSC proposes to increase CHIP co-payments for members above 150 percent of the federal poverty level (FPL) up to and including 185 percent FPL from \$7 to \$12 for office visits; \$5 to \$8 for generic prescription drugs; and \$20 to \$25 for brand name prescription drugs. In addition, HHSC proposes to increase CHIP co-payments for members above 185 percent FPL up to and including 200 percent FPL from \$10 to \$16 for office visits; \$5

to \$8 for generic prescription drugs; and from \$20 to \$25 for brand name prescription drugs.

The proposed amendment is estimated to result in a savings of \$832,653 for the second half of state fiscal year (SFY) 2011 (March 1, 2011 through August 31, 2011), consisting of \$582,443 savings in federal funds and \$250,210 savings to state general revenue. For FFY 2012, the estimated annual savings is \$1,719,110 consisting of \$1,204,280 savings in federal funds and \$514,830 savings in state general revenue.

To obtain copies of the proposed amendments, interested parties may contact Valerie Eubert-Baller, Senior Policy Analyst, Medicaid and CHIP Division, by mail at P.O. Box 85200, MC: H-310, Austin, TX 78708; by telephone at (512) 491-1164; by facsimile at (512) 491-1953; or by e-mail at Valerie.Eubert-Baller@hhsc.state.tx.us.

TRD-201005445
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 20, 2010



Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 10-059, Amendment Number 952, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of the amendment is to update the website address where Medicaid provider fee schedules and reimbursement rates can be accessed. The requested effective date for the proposed amendment is September 1, 2010. The proposed amendment has no anticipated fiscal impact.

To obtain copies of the proposed amendment, interested parties may contact James Jenkins by mail at 11209 Metric Boulevard, H-400; Austin, Texas 78758; by telephone at (512) 491-2865; by facsimile at (512) 491-1973; or by e-mail at james.jenkins@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005454
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 21, 2010



Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 10-061, Amendment Number 954, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to update and clarify the state plan to correspond to recent Texas Administrative Code changes regarding federally qualified health centers. In addition, HHSC will add language that describes the revised cost settlement process for newly enrolled providers. The proposed amendment is effective October 2, 2010.

The proposed amendment is estimated to result in an additional annual expenditure of \$0 for federal fiscal year (FFY) 2010, consisting of \$0 in federal funds and \$0 in state general revenue. For FFY 2011, the

additional annual expenditure is \$0 consisting of \$0 in federal funds and \$0 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Andrew Wolfe, Hospital Reimbursement, by mail Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1371; by facsimile at (512) 491-1998; or by e-mail at Andrew.Wolfe@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005464

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 21, 2010

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit a Transmittal Number 10-062, Amendment Number 955 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective October 1, 2010.

The amendment updates and clarifies the methodology HHSC uses to qualify hospitals, compute hospital specific limits and calculate payments for hospitals that participate in the Disproportionate Share Hospital (DSH) Program. The amendment also addresses changes that are required in the state plan to conform to new audit requirements contained in the December 19, 2008 Federal Medicaid Disproportionate Share Hospital (DSH) final rule (73 FR 77904)

The proposed amendment is estimated to result in no change in the amount of federal funds received by the state as a result of these changes and will not result in the expenditure of any additional general revenue.

Interested parties may obtain copies of the proposed amendment by contacting Diana Miller, Hospital Reimbursement, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1436; by facsimile at (512) 491-1998; or by e-mail at Diana.Miller@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005469

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 22, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Transmittal Number 10-063, Amendment Number 956, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to update the state plan to correspond to recent Texas Administrative Code changes regarding Supplemental Payments for Physician Services. Specifically, HHSC is adding Texas A&M Health Science Center to the list of approved state entities that

are eligible to receive supplemental payments for physician services. The supplemental payments will allow Texas A&M Health Science Center to recover unreimbursed costs they incur in providing physician services to Medicaid patients. The proposed amendment is effective October 1, 2010.

The proposed amendment is estimated to result in an additional annual expenditure of \$1,060,955 for federal fiscal year (FFY) 2010, consisting of \$752,641 in federal funds and \$308,314 in local intergovernmental transfer of funds (\$0 in state general revenue). For FFY 2011, the additional annual expenditure is \$1,060,955 consisting of \$642,514 in federal funds and \$418,441 in intergovernmental transfers (\$0 in state general revenue).

To obtain copies of the proposed amendment, interested parties may contact Jill Seime, Hospital Reimbursement, by mail Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1863; by facsimile at (512) 491-1998; or by e-mail at jill.seime@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005470

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 22, 2010

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 10-064, Amendment Number 957, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to update and clarify the state plan to correspond to recent Texas Administrative Code changes regarding supplemental payments to rural hospitals. The proposed amendment is effective October 1, 2010.

The proposed amendment is estimated to result in no change in the amount of federal funds received by the state as a result of these changes and will not result in the expenditure of any additional general revenue.

To obtain copies of the proposed amendment, interested parties may contact Kevin Niemeyer, Hospital Reimbursement, by mail Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1366; by facsimile at (512) 491-1998; or by e-mail at Kevin.Niemeyer@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005471

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Filed: September 22, 2010

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amendment #	Date of Action
Groves	S & E Healthcare Groves Operations LLC dba Renaissance Hospital Groves	L06325	Groves	00	08/20/10

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amendment #	Date of Action
Austin	St. David's Healthcare Partnership LP, LLP dba St. David's South Austin Medical Center	L03273	Austin	92	08/24/10
Austin	Cedra Clinical Research LLC	L05723	Austin	06	08/20/10
Corpus Christi	Narain D. Mangla, M.D., P.A.	L05630	Corpus Christi	05	08/16/10
Corpus Christi	McTurbine, Inc.	L04341	Corpus Christi	09	08/23/10
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	109	08/24/10
Dallas	Metrocrest Hospital Authority dba Dallas Medical Center	L02314	Dallas	59	08/19/10
Fredericksburg	Hill County Memorial Hospital dba Hill Country Memorial	L03516	Fredericksburg	33	08/16/10
Greenville	Hunt Memorial Hospital District dba Hunt Regional Medical Center	L01695	Greenville	39	08/25/10
Houston	Houston Cancer Institute P.A. dba Houston Diagnostics and PET/CT Center	L06193	Houston	02	08/24/10
Houston	Oncology Consultants P.A.	L06339	Houston	01	08/17/10
Houston	Texas Children's Hospital	L04612	Houston	49	08/19/10
Houston	Baylor College of Medicine	L00680	Houston	102	08/25/10
Houston	Memorial Hermann Hospital System dba Memorial Hospital Memorial City	L01168	Houston	121	08/24/10
Houston	Kelsey Seybold Clinic P.A.	L00391	Houston	68	08/20/10
La Porte	Total Petrochemicals USA, Inc.	L04640	La Porte	24	08/25/10
Lubbock	Covenant Health System dba Covenant Medical Center-Lakeside	L01547	Lubbock	93	08/24/10
Mineral Wells	Palo Pinto General Hospital	L01732	Mineral Wells	35	08/20/10
Pittsburg	East Texas Medical Center-Pittsburg	L03106	Pittsburg	27	08/24/10
Plano	Texas Health Presbyterian Hospital-Plano	L04467	Plano	58	08/20/10
Port Arthur	Gulf Coast Cardiology Group P.A.	L05393	Port Arthur	16	08/20/10
Richardson	Truglo, Inc.	L05519	Richardson	07	08/17/10
San Antonio	Christus Santa Rosa Health Care	L02237	San Antonio	121	08/13/10
San Antonio	Methodist Healthcare System of San Antonio Ltd., LLP	L00594	San Antonio	276	08/17/10
San Antonio	VHS San Antonio Imaging Partners LP dba Baptist M&S Imaging Centers	L04506	San Antonio	73	08/19/10
San Antonio	ACA SA LTD dba Sendero Imaging & Treatment Center	L05567	San Antonio	15	08/19/10
San Antonio	VHS San Antonio Partners LLC	L00455	San Antonio	200	08/26/10
San Antonio	South Texas Cardiovascular Consultants PLLC	L03833	San Antonio	31	08/20/10
Sugar Land	Thermo Process Instruments LP	L03524	Sugar Land	82	08/19/10
Texas City	CHCA Mainland LP dba Mainland Medical Center	L02577	Texas City	40	08/16/10
Texas City	Marathon Petroleum Company LLC	L04431	Texas City	27	08/25/10
The Woodlands	Memorial Hermann Hospital System dba Memorial Hermann Hospital The Woodlands	L03772	The Woodlands	79	08/20/10

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amendment #	Date of Action
The Woodlands	Memorial Hermann Hospital System dba Memorial Hermann Hospital The Woodlands	L03772	The Woodlands	80	08/27/10
Throughout TX	ECS-Texas LLP	L05384	Addison	07	08/19/10
Throughout TX	Team Industrial Services, Inc.	L00087	Alvin	219	08/26/10
Throughout TX	Nondestructive & Visual Inspection LLC	L06162	Carthage	04	08/17/10
Throughout TX	Chappell Hill Logging Systems, Inc.	L05522	Chappell Hill	04	08/17/10
Throughout TX	Terracon Consultants, Inc.	L05268	Dallas	33	08/16/10
Throughout TX	Fugro Consultants, Inc.	L03461	Dallas	27	08/16/10
Throughout TX	CTL Thompson Texas LLC	L04900	Dallas	15	08/16/10
Throughout TX	Lockheed Martin Corporation	L05633	Fort Worth	10	08/17/10
Throughout TX	Probe Technology Services, Inc.	L05112	Fort Worth	24	08/18/10
Throughout TX	Pioneer Wireline Services LLC	L06220	Graham	05	08/16/10
Throughout TX	Professional Services Industries, Inc.	L06332	Grapevine	01	08/25/10
Throughout TX	Monitoring Services	L04501	Houston	12	08/13/10
Throughout TX	Protechnics	L03835	Houston	55	08/25/10
Throughout TX	Tolunay Wong Engineers, Inc.	L04848	Houston	12	08/26/10
Throughout TX	Arends Inspection LLC	L06333	Houston	02	08/23/10
Throughout TX	Pathfinder Energy Services LLC	L05236	Katy	21	08/17/10
Throughout TX	Pathfinder Energy Services LLC	L05236	Katy	22	08/27/10
Throughout TX	Master Industries, Inc.	L05872	Liberty	25	08/24/10
Throughout TX	Southwest Research Institute	L00775	San Antonio	80	08/20/10
Throughout TX	Kakivik Asset Management LLC	L06211	Trinity	01	08/24/10
Tyler	Mother Frances Hospital Regional Health Care Center	L01670	Tyler	157	08/20/10
Vernon	American Electric Power-Public Service Company of Oklahoma	L03481	Vernon	21	08/19/10

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amendment #	Date of Action
Groves	LTHM Groves Operations LLC dba Renaissance Hospital Groves	L06270	Groves	01	08/20/10
Houston	Bharat Patel, M.D., P.A. dba Bay Area Heart Center	L05444	Houston	10	08/13/10
Houston	Lumar Imaging, Inc.	L06203	Houston	01	08/24/10
Midland	Diabetes Center of the Southwest	L03238	Midland	17	08/25/10
Throughout TX	Bell Helicopter Textron, Inc.	L05929	Fort Worth	04	08/23/10

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, TX 78714-9347. For information call (512) 834-6688.

TRD-201005460
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: September 21, 2010

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by FCCI INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Sarasota, Florida.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201005427
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 20, 2010

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Company Licensing

Application for Certificate of Authority as a Multiple Employer Welfare Association (MEWA) in the State of Texas by SBU REAL ESTATE AND INSURANCE PROFESSIONAL PURCHASING COOP, a domestic MEWA. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201005473
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 22, 2010

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Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2719 on November 9, 2010 at 9:30 a.m. in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, in Austin, Texas, to consider the Texas Windstorm Insurance Association's (Association) petition related to the maximum limits of liability for windstorm and hail insurance policies covering the following: residential dwellings and individually owned townhouses and associated contents; contents of apartments, condominiums, or townhouses; commercial structures and associated contents; and governmental structures and associated contents. The petition was submitted pursuant to Texas Insurance Code §§2210.502 - 2210.504.

This notice is made pursuant to Texas Insurance Code §2210.504(a), which requires notice and a hearing prior to the Commissioner's approval, disapproval, or modification of the Association's proposed adjustments to the limits of liability for its windstorm and hail insurance policies. This proceeding is exempt from the contested case procedures in Texas Insurance Code Chapter 40.

A copy of the Association's petition is available for review in the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701. To request a copy of the petition (Reference No. P-0910-07), contact Sylvia Gutierrez at (512) 463-6327. For additional information, interested parties may contact Marilyn Hamilton, Property and Casualty Associate Commissioner, by mail at MC 104-PC, Texas Department of Insurance, 333 Guadalupe, Austin, Texas 78701; or by phone at (512) 322-2265.

TRD-201005467
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 21, 2010

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Purchase of Land

McKinney Falls State Park - Travis County

In a meeting on Thursday, November 4, 2010, the Texas Parks and Wildlife Commission (the Commission) will consider purchasing approximately 10.4 acres adjacent to McKinney Falls State Park in Travis County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Purchase of Land

Texas Freshwater Fisheries Center - Henderson County

In a meeting on Thursday, November 4, 2010, the Texas Parks and Wildlife Commission (the Commission) will consider purchasing approximately 14.0 acres adjacent to the Texas Freshwater Fisheries Center in Henderson County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Exchange of Land

Pedernales Falls State Park - Blanco County

In a meeting on Thursday, November 4, 2010, the Texas Parks and Wildlife Commission (the Commission) will consider the exchange of approximately 320 acres of underutilized land in Blanco County for a conservation easement on approximately 235 acres adjacent to Pedernales Falls State Park in Blanco County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road,

Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-201005472

Ann Bright

General Counsel

Texas Parks and Wildlife Department

Filed: September 22, 2010

Public Utility Commission of Texas

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 15, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Matrix Telecom, Inc. d/b/a Trinsic Communications for a Service Provider Certificate of Operating Authority, Docket Number 38679.

Applicant intends to provide facilities-based and resale telecommunications services.

Applicant's requested SPCOA comprises the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 8, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38679.

TRD-201005474

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: September 22, 2010

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 20, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of WiMacTel, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 38697.

Applicant intends to provide facilities-based and resold telecommunications services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 8, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38697.

TRD-201005475

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: September 22, 2010

Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on September 13, 2010, for an amendment to certificated service area boundaries within Lubbock County, Texas.

Docket Style and Number: Joint Application of Southwestern Public Service Company and Lubbock Power & Light to amend a Certificate of Convenience and Necessity for Service Area Boundaries within Lubbock County. Docket Number 38656.

The Application: Southwestern Public Service Company (SPS) and Lubbock Power & Light (LP&L) (jointly applicants) filed with the Public Utility Commission of Texas (commission) an application for a service area boundary change. Applicants state that the proposed boundary change is necessary for the release of territory from SPS to LP&L to ensure LP&L's ability to serve the subject service area after it is decertified by SPS and removed from SPS's Certificate of Convenience and Necessity per the commission's order in Docket Number 37901.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than October 8, 2010 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38656.

TRD-201005420

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: September 17, 2010

Notice of Petition for Rulemaking to Enact New Substantive Rule to Provide for Recovery of Purchased Power Capacity Costs

On September 17, 2010, Entergy Texas, Inc. (ETI) filed a petition for rulemaking with the Public Utility Commission of Texas (commission) to initiate a rulemaking to promulgate a new section to enhance the ability of a utility to timely recover purchased power capacity costs. The rule would allow for annual adjustments to capture both increases and decreases in purchased power capacity costs, and periodic reconciliation to ensure that only reasonable and necessary, actually incurred purchased power capacity costs are recovered from customers. ETI asserted that the rule would reduce the need for expensive and resource consuming base rate proceedings, thereby reducing costs to customers; provide for more efficient recovery of variable purchased power costs; and help support a stronger financial condition and lower cost of capital for the utility by providing for more timely cost recovery.

Specifically, the rule would permit electric utilities to elect recovery of purchased power capacity costs through a "Purchase Power Recovery Factor" (PPRF) outside of base rates with the PPRF to be adjusted annually. Costs recovered under the PPRF would be reconciled at the

same time that fuel expense is reconciled pursuant to the schedule prescribed by P.U.C. Substantive Rule §25.236.

The petition is assigned Project Number 38692 - *Petition for Rulemaking to Enact New Substantive Rule to Provide for Recovery of Purchase Power Capacity Costs*. Under the Administrative Procedure Act, Texas Government Code §2001.021, the commission shall either deny the petition in writing, stating its reasons for denial, or initiate a rulemaking proceeding not later than the 60th day after the date the petition is filed.

The deadline to file comments in this project is 3:00 p.m., Friday, October 22, 2010, and 16 copies of comments are required. The commission requests specific comments on the commission's authority to adopt such a rule. Copies of the petition are available for review and copying from the commission's Central Records, William B. Travis Building, 8th Floor, 1701 North Congress Avenue, Austin, Texas 78701 or through the Interchange on the commission's web site at www.puc.state.tx.us. Comments shall be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78701 or P.O. Box 13326, Austin, Texas 78711-3326. All inquiries and comments concerning this petition for rulemaking should refer to Project Number 38692.

Interested persons may contact the commission at (512) 936-7120 or (toll-free) 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-201005485
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 22, 2010

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Public Notice of Open Meeting/Workshop Regarding the Entergy Successor Arrangement

The staff of the Public Utility Commission of Texas (commission) will hold an open meeting/workshop regarding the Entergy Successor Arrangement, on Thursday, October 7, 2010 at 1:30 p.m. to 5:00 p.m. in Commissioners' Hearing Room, located on the 7th floor of the

William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 38708 has been established for this proceeding.

Questions concerning the hearing or this notice should be referred to Richard Greffe, Competitive Markets, (512) 936-7404. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201005486
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 22, 2010

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and 43 Texas Administrative Code §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

http://www.txdot.gov/public_involvement/hearings_meetings.

Or visit www.txdot.gov, click on Public Involvement and click on Hearings and Meetings.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201005384
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 16, 2010

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How to Use the Texas Register

Information Available: The 14 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules - sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: <http://www.sos.state.tx.us>. The *Register* is available in an .html version as well as a .pdf (portable document

format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at <http://www.sos.state.tx.us/tac>.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*. If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION

Part 4. Office of the Secretary of State

Chapter 91. Texas Register

40 TAC §3.704.....950 (P)